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Supreme Court, U.S.
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No.

IN THE SUPREME COURT
OF THE UNITED STATES

CHARLES REARDON,
Petitioner,

v.

NEIL COLA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Whether a federal court may, on habeas review, refuse to apply a state procedural contemporaneous objection rule without finding cause and prejudice as mandated by Wainwright v. Sykes, 433 U.S. 73 (1977)?

II. Whether a federal court may mandate requirements for state court prosecutors not required under state law?

III. Whether a federal court may, on habeas review, extend the holding of Dunn v. United States, 442 U.S. 100 (1979) to allow federal supervision over state court trials?

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No.

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CHARLES REARDON,
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NEIL COLA,
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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BELOW

The opinion of the Court of Appeals, Cola v. Reardon, No. 85-1324 is scheduled to be reported at 787 F.2d 681 (1st Cir. 1986). (App. A). The opinion of the district court is not reported (No. 85-225-S, (D.C.Mass. 1985)) (App. B). The decision of the Massachusetts Appeals Court, Commonwealth v. Cola, is reported at 18 Mass. App. Ct. 598, 468

N.E.2d 1094 (1984) (App. C). The decision of the Massachusetts Supreme Judicial Court denying review is reported at 393 Mass. 1104, 471 N.E.2d 1104 (1984). (App. D).

JURISDICTION

The decision below issued on March 26, 1986. A motion to stay issuance of the mandate pending the filing of a petition for writ of certiorari was allowed until June 6, 1986. The jurisdiction of this court is claimed under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

> Section One. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Neil Cola was charged by indictment with two violations of the Massachusetts Conflict of Interest Statute. The first of these indictments alleged that Cola, while a state employee, participated in a particular matter in which the state had an interest and in which he or his immediate family had a financial interest, all in violation of M.G.L. c. 268A, §6. The second indictment charged Cola with violating §4(c) of the same

statute and alleged that Cola, while a state employee, acted as agent or attorney for one other than the Commonwealth in a particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest. (Hereinafter the "agency" indictment).

Cola was tried before a state court jury and convicted of both charges on July 22, 1983. He received a sentence of one year in the House of Corrections on the agency indictment, and a fine of $3,000 on the financial interest indictment.

Cola appealed from both convictions to the Massachusetts Appeals Court. That Court affirmed both convictions, finding no merit in "Cola's complaint that the prosecution's theory under the agency indictment was first culled from

the record during the appellate proceedings." Commonwealth v. Cola, 18 Mass. App. 598, 611 (1984).[1/] Cola sought further appellate review by the Massachusetts Supreme Judicial Court. That application was denied. Commonwealth v. Cola, 393 Mass. 1104, 471 N.E.2d 1354 (1984).

Cola then filed a Petition for Writ of Habeas Corpus in the District of Massachusetts. The Petition sought

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1/ Contrary to the interpretation of the Court below, the Massachusetts Appeals Court found Cola's activities in procuring a loan for Michael Rapp in the context of the evidence presented at trial to be criminal under Massachusetts law. 18 Mass. App. 598, 607-608.

habeas relief only as to the agency indictment. The District Court found Cola's claim that the theory upon which the Massachusetts Appeals Court upheld his conviction was not the same as the theory upon which he was tried to be without merit. The District Court concluded that the Appeals' Court's holding was encompassed in the evidence and in the indictment and bill of particulars; that Cola was precluded by the Massachusetts contemporaneous objection rule from presenting claimed defects in the trial judge's charge absent a showing of cause and prejudice for his failure to object; and that there was no legal requirement under state law that the prosecutor articulate in his arguments the theory on which the state appellate court upheld the conviction. Accordingly, the District

Court denied and dismissed the petition. Cola v. Reardon, No. 85-225-S, slip.op. (D.C.Mass. March 26, 1985).

The Court of Appeals reversed the order of the District Court and ordered that the Petition for a writ of habeas corpus be granted.

It is from the order of the Court of Appeals granting habeas relief that the respondent now seeks Certiorari.

REASONS FOR GRANTING THE WRIT

I. The decision below which is neither constitutionally nor logically compelled is in conflict with basic principles of comity and federalism articulated by this court which limit the scope of review on habeas corpus.

A. The Court of Appeals has usurped the Commonwealth's Authority to interpret and apply its contemporaneous objection rule in conflict with

Wainwright v. Sykes, 433 U.S. 73 (1977) and Engle v. Isaacs, 456 U.S. 107 (1981).

B. The Court of Appeals has exceeded its authority by imposing allegedly constitutional requirements on a prosecutor's opening and closing argument, in conflict with decisions holding such aspects of trial to be matters of state law.

C. The Court of Appeals has extended Dunn. v. United States, 442 U.S. 100 (1979), a case decided under this court's supervisory powers, to allow federal intervention in state court trials by elevating trial errors to errors of constitutional proportion.

ARGUMENT

I. THE DECISION OF THE COURT BELOW EXCEEDS THE PROPER SCOPE OF HABEAS REVIEW AND IS IN CONFLICT WITH THE PRINCIPLES OF COMITY AND FEDERALISM ADHERED TO BY THIS COURT AND LOWER FEDERAL COURTS.

A. THE LOWER COURT'S REFUSAL TO APPLY A STATE PROCEDURAL BAR CONFLICTS WITH DECISIONS OF THIS AND LOWER COURTS.

At his trial in state court, counsel was invited by the trial judge to request further instructions, on five occasions. No objection to the judge's charge to the jury was made. (TR. 772-779).[2/]

On direct appeal to the state appellate court, Cola claimed that the instructions were "suffused with 'pervasive and fundamental' error". Commonwealth v. Cola, 18 Mass. App. Ct. 598, at 603. The Massachusetts Appeals Court ruled:

2/ Counsel did request an additional instruction, irrelevant to his later claims, and that instruction was given (TR. 772-779).

> In the circumstances, there is no occasion for us to consider the claimed errors in the jury instructions. Mass. R Crim. P. 24(b), 378 Mass. 895 (1979) provides: 'No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects as the grounds of his objection'...As to the charge, the residual question, therefore, is whether, viewed as a whole, it created a substantial risk of a miscarriage of justice. Id., 604 (citations omitted).

On habeas review, Cola again asserted that the charge to the jury should be examined. The District Court ruled that:

> ...There has been no showing of cause for noncompliance with the state rule which would exempt this case from the strictures of the cited cases. Cola v. Reardon,

> No. 85-225-S, slip.op. at 10 (D.C.Mass., March 26, 1985) citing Wainwright v. Sykes, 433 U.S. 72 (1977); McLaughlin v. Gabriel, 726 F.2d 7,9 (1st Cir. 1984).

The Court below, however, examined the charge and ruled that:

> ...the reliance of both the Appeals Court and the district court on the state contemporaneous objection rule was erroneous...Cola v. Reardon, No. 85-1324, slip.op. p.35 (1st Cir. 1986).

It is submitted that this refusal of the Court of Appeals to honor Massachusetts' contemporaneous objection rule without a showing of cause and prejudice is squarely contrary to this Court's holding in Wainright v. Sykes, 433 U.S. 73, 97 S.Ct. 2497 (1977) wherein this Court held that habeas review of a claimed violation of a

federal right is not open to one who fails to comply with a state contemporaneous objection rule, absent a showing of cause and prejudice.3/

This holding also conflicts with the decisions of other lower federal

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3/ The court below did not examine the petitioner's failure to object for cause and prejudice, but justified its departure from Wainwright v. Sykes, supra. on the premise that an examination of the charge under Dunn, supra. is not an examination for purposes of finding inherent error, but for resolving the "evidentiary" inquiry of determining the exact case before the jury. Cola v. Reardon, 85-1324, slip. op. 33 (1st Cir. 1986). However, the Massachusetts Appeals Court has conducted this evidentiary inquiry and determined the exact case before the jury. This factual finding should have been granted the presumption of correctness mandated by Sumner v. Mata, 449 U.S. 539 at 548, 549 (1981).

If the gist of the defendant's claim of error, as stated by the Court of Appeals, was that the trial judge did not "frame the charge in terms by which the jury could have found Cola guilty of the §4(c) violation" (Cola v. Reardon, supra, at 4), that objection was clearly open to counsel at the close of trial and was not dependent upon a later construction placed on the evidence by an appellate court.

courts.[4/]

4/ Virtually every circuit has held that where a state appellate court clearly invokes it's procedural default rules, that holding stands as an adequate and independent state ground and the unpreserved issue cannot be re-examined by a federal court on habeas review, absent a showing of cause and prejudice. McCown v. Callahan, 726 F.2d 1 (1st Cir. 1984); Phillips v. Smith (2nd Cir. 1984), cert. denied 465 U.S. 1027 (1984); Oliver v. Zimmerman 720 F.2d 766, 771 (3d Cir. 1983) citing Engle v. Isaac, 456 U.S. 107 at 129, 102 S.Ct. at 1572 (1981); Davis v. Allsbrooks, 778 F.2d 168, (4th Cir. 1985); Johnson v. Blackborn, 778 F.2d 1044, 1048 (5th Cir. 1985); Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980), cert. denied 450 U.S. 933, 101 S.Ct. 1395 (1981); Farmer v. Prast, 721 F.2d 602 (7th Cir. 1983); Evell v. Wyrick, 675 F.2d 1007, 1008 (8th Cir. 1982); Runnels v. Hess, 713 F.2d 596 (10th Cir. 1983); Riley v. Wainwright, 778 F.2d 1544, 1551 (11th Cir. 1985). See also Engle v. Isaac, 456 U.S. 107 (1982). However, the tenth, fifth, and ninth circuits have held that habeas review of an unobjected to claim will not be barred where the state appellate courts have entertained the merits of the claim. Hux v. Murphy, 733 F.2d 737 (10th Cir. 1984); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Bradford v. Stone, 594 F.2d 1294, 1296 n.2 (9th Cir. 1979).

B. THE LOWER COURT'S IMPOSITION OF NON-EXISTENT CONSTITUTIONAL REQUIREMENTS ON A STATE PROSECUTOR'S ARGUMENT IS IN CONFLICT WITH DECISIONS OF THIS AND OTHER COURTS HOLDING THAT ARGUMENTS ARE A MATTER OF STATE LAW.

In granting habeas review, the Court of Appeals found that "in order for evidence supporting the appellate theory to be given weight, such evidence must be related by the prosecutor to the appellate theory, and not left unexplained." (Cola v. Reardon, No. 85-1324, slip.op. p.31, n.11 (1st Cir. 1986). The Court went on to find that the prosecutor in Cola's case had made only side-references to the appellate theory and the opening argument was therefor "constitutionally infirm." Id.,at 31 There is no such requirement under Massachusetts law; nor is there such a requirement in a majority of

jurisdictions.[5/]

5/ Massachusetts Rule of Criminal Procedure 24 regulates arguments of counsel in the state's criminal proceedings. It sets forth no requirements as to content of the argument. Massachusetts is part of the majority of jurisdictions in which the function of the prosecutor's opening statement is viewed as an aid to the jury; to alert them as to what evidence is expected to be presented. The opening statement is not required to cover all elements of the charge; it does not enlarge or add elements to an indictment. Commonwealth v. Zakas, 350 Mass. 265, 263 N.E.2d 446 (1970), Rosenberg V. Commonwealth, 372 Mass. 59,62, 360 N.E.2d 903 (1975). See also Commonwealth v. Fazio, 375 Mass. 451, 378 N.E.2d 648 (1978); People v. Gomez, 131 Colo. 576, 283 P.2d 949 (2955); White v. State, 11 Md.App. 423, 274 A.2d 671 (1971); People v. Wade, 35 App.Div.2d 401, 317 N.Y.S.2d 122 (1970); McCoy v. State, ___Okla Cr.___ 493 P.2d 833, (1972). At least one federal court shares this view: Webb v. U.S., 191 F.2d 512 (10th Cir. 1951). The minority view finds the function of the opening statement to be to inform the accused of the contemplated course of the prosecution. Chatman v. State, 164 Ind. 97, 320 N.E. 3d, 839 (1975); State v. Masters, ___Mo.App. ___, 530 S.W.2d, 28 (1975). Therefor, the requirements articulated by the court below effect other jurisdictions, as well as Massachusetts.

It is submitted that the decision of the court below is an attempt to regulate the content of argument by counsel in a state court proceeding.

This attempt conflicts with the principle observed by this and other courts that in the absence of an allegation that a prosecutor's remarks impermissibly infringed upon a specific provision of the Bill of Rights or were so prejudicial as to infect the trial with unfairness resulting in a denial of due process, the regulation of the content of argument by counsel in a state criminal proceeding is a matter of state law and not a proper subject for federal habeas review under 28 U.S.C. § 2254. Bergenthal v. Cady, 466 F.2d 635 (7th Cir. 1972); Higgins v. Wainwright, 424 F.2d 177 (5th Cir. 1970), cert. denied, 400 U.S. 905 (1970); Downie v.

Burke, 408 F.2d 343 (7th Cir. 1969), cert. denied 345 U.S. 940 (1969); Castillo v. Fay, 350 F.2d 400 (2nd Cir. 1965), cert. denied 382 U.S. 1019 (1966); Chavez v. Dickson, 280 F.2d 727 (9th Cir. 1960), cert. denied, 364 U.S. 934 (1961); Donnelly v. DeChristoforo, 416 U.S. 637 (1984).

C. THE DECISION BELOW, WHICH EXTENDS THE HOLDING OF DUNN V. UNITED STATES, 442 U.S. 100 (1979) TO ALLOW FEDERAL COURT SUPERVISION OVER STATE TRIALS IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

In granting habeas relief, the court below held that even where a state appellate court finds ample evidence of guilt of the charge articulated in an indictment, the conviction cannot be affirmed unless the state appellate court finds the prosecution to have emphasized in argument the same evidence viewed as most compelling by the State

Appellate Court. Cola v. Reardon, No. 85-1224, Slip.Op. at 31, n. 11 (1st Cir. 1986).

The Court of Appeals also held that even though evidence supporting the state appellate court's affirmance of guilt was present in the record "the presence of such evidence is irrelevant to the due process violation here". The court relied upon the decision of this Court in Dunn v. United States, 442 U.S. 100 (1979) for its holding.

Dunn has never been interpreted to allow federal supervision over state trials. Other lower federal courts have held that the relevant inquiry under Dunn is simply whether the evidence adduced at trial established facts different from those alleged in the indictment. On supervisory review, other courts have set aside convictions

under Dunn only where evidence outside the scope of the indictment is offered in support of affirmance. This view is held by the Second, Sixth, and Tenth circuits.6/

It is submitted that the Court of Appeals erred in extending this Court's holding in Dunn to require federal courts, on habeas review, to inquire

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6/ United States v. Heimann, 705 F.2d 662, 667 (2nd Cir. 1983); Sperling v. United States, 692 F.2d 223, 227 (2nd Cir. 1982); United States v. Whitlock, 663 F.2d 1101 (2nd Cir. 1983); Byrd v. Israel, 513 F.Supp. 1077, 1080 (E.D. Wisconsion 1981; United States v. Tibbs, 600 F.2d 19, 22 (6th Cir. 1979); United States v. Irwin, 654 F.2d 671, 684 (10th Cir. 1981); United States v. Brewer, 630 F.2d 795 (10th Cir. 1980); United States v. Bliss, 642 F.2d 390, 392 (10th Cir. 1981). But see, United States v. Booty, 621 F.2d 1291, 1301 (5th Cir. 1980), where the prosecutor's argument was considered, in addition to the evidence adduced at trial in determining whether due process was violated.

beyond the indictment and the facts adduced at trial.

Moreover, Dunn is factually distinguishable from the case at bar. In Dunn, the indictment specifically alleged the perjurious statement as one which occurred on October 21; the proof of the falsity of the September 30 statement was not the offense described by the indictment. Therefor, Dunn was not indicted for the crime urged on appeal. In the instant case, the lower court found that the evidence upon which the state appellate court relied to affirm Cola's conviction was in fact included in the broad indictment for which Cola stood trial, but held that because the arguments of counsel and charge to the jury did not "meaningfully reflect" the state appellate court's position, "due process could not be

reinstated through implicit references in the indictment". Cola v. Reardon, 85-1324 slip.op. at 41-42 (1st Cir. 1986). It is submitted that this approach goes far beyond the limited ruling of Dunn and other lower federal court holdings cited supra., which require only that the indictment correspond to the evidence offered in support of affirmance of the conviction on appeal.

In addition, the lower court erred in applying a Dunn analysis on habeas review. Dunn was decided under this Court's exercise of supervisory powers over the lower federal courts. It is asserted that by dictating what aspects of Cola's trial should have been reviewed by the state appellate court, the lower court has violated principles of comity and federalism which underlie

the federal habeas corpus statute by elevating "preferred practice" to error of constitutional dimension.

It has long been recognized that

> the Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental...
>
> Its procedure does not run afoul of the Fourteenth Amendment because another method may seem to...be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). See also Coggins v. O'Brien, 188 F.2d 130 (1st Cir. 1951), Spencer v. Texas, 385 U.S. 554, 566 (1966).

By misapplying Dunn in the context of habeas review, the Court of Appeals has blurred the distinction between

ordinary trial error and the type of egregious misconduct traditionally required to amount to a denial of constitutional due process. To blur this important distinction is in conflict with traditional notions of comity and federalism and this court's decision in Donnelly v. DeChristoforo, 416 U.S. 637, at 648 (1979).

CONCLUSION

For the reasons stated above the writ of certiorari should issue to review the decision of Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1324

NEIL R. COLA,
Plaintiff, Appellant,

v.

CHARLES H. REARDON,
SHERIFF OF ESSEX COUNTY,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter J. Skinner,
U.S. District Judge]

Before

Coffin, Aldrich and Torruella,

Circuit Judges.

March 26, 1986

TORRUELLA, Circuit Judge. This is an appeal from the denial of a habeas petition filed by Neil R. Cola to challenge his state court conviction under a Massachusetts statute. Appellant's central contention is that he was not convicted by a jury but rather by a state appellate tribunal on a theory of guilt never raised at trial. Thus, because due process requires guilt to be determined based on the case as presented to the jury, Cola argues that his conviction was unconstitutionally affirmed on a theory of guilt not set forth at trial. Due to the Supreme Court's decision in Dunn v. United States, 442 U.S. 100 (1979), and because we are constrained to apply the Massachusetts Appeals Court

interpretation of state law, we are compelled to grant appellant's request for the issuance of a writ of habeas.

As a result of the complex factual and legal background involved in this case, our opinion will be divided into the following four sections: (1) the factual background as presented at trial; (2) the rationales of the Massachusetts Appeals Court and the district court below; (3) analysis of appellant's due process claim; and (4) issues raised by the Commonwealth on appeal.

I. FACTUAL BACKGROUND

On December 7, 1982, appellant Cola, then an attorney employed by the Massachusetts Department of Revenue, was charged under separate indictments with two violations of the state's conflict

of interest statute, Mass. Gen. Laws ch. 268A. The first indictment ("the financial interest indictment") charged Cola with violating Mass. Gen. Laws ch. 268, §6, by participating in a matter in which he and his family had a financial interest. The second, ("the agency indictment"), accused him of violating Mass. Gen. Laws ch. 268A, §4(c), by acting as agent for someone other than the Commonwealth of Massachusetts in a matter in which the Commonwealth and a state agency was a party and had a direct and substantial interest. The charges related to certain business dealings that Cola had become involved in with a friend named Michael Rapp.

After a seven day jury trial in Suffolk Superior Court, Cola was convicted of both charges. His motion

for a new trial was denied. For the financial interest conviction Cola was fined $3,000, and for the agency conviction he was sentenced to one year in prison. On appeal to the Massachusetts Appeals Court, both convictions were affirmed, and the Supreme Judicial Court denied Cola's application for further review.

Cola then filed a habeas petition in the United States District Court for the District of Massachusetts, challenging only his conviction under Mass. Gen. Laws ch. 268A, §4(c) (the agency conviction). He claimed essentially that he had been denied due process because the state appellate court affirmed his conviction under §4(c) on grounds that were never specified in the indictment nor presented to the jury.

Cola also claimed that the court's charge to the jury was faulty in that it did not frame the charge in terms by which the jury could have found Cola guilty of the §4(c) violation.

The district court rejected Cola's argument, holding that there was no variance between the indictment as limited by the bill of particulars, the proof at trial, and the basis on which the state appeals court upheld the conviction. In short, the district court found that the theory of guilt upon which the state appeals court affirmed had been set forth in the indictment and at trial. Additionally, since the appellant had made no objections to the jury instructions at the time they were given, the district court found that he had clearly waived

any right to object under state law.[1/] Mass. R. Crim. P. 24(b); Commonwealth v. Pope, 15 Mass. App. Ct. 505 (1983).

For purposes of this review, we will set out the most pertinent facts as we have found them in the record, and in the light most favorable to respondent, the Commonwealth of Massachusetts. Given that the principal stages of trial -- the government's proof, the prosecutor's opening and summation, and the judge's charge -- essentially focus

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1/ The Massachusetts contemporaneous objection rule provides: "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection." Mass. R. Crim. P. 24(b).

on two transactions, a $30,000 loan/second mortgage and a $10,000 loan/payback, our discussion will be likewise divided.[2/] After reviewing facts or proof adduced at trial, we will also examine the extent to which the indictment, as reduced by the bill of particulars, corresponds to such proof or any other theory of guilt.

1. The $30,000 loan to Rapp and second mortgage to John Volpe

While employed as an attorney in the compliance bureau of the Massachusetts Department of Revenue, Neil Cola became

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2/ A more extensive recapitulation of the testimony adduced at trial can be found in the state appeals court decision, Commonwealth v. Cola, 18 Mass. App. Ct. 598, 468 N.E.2d 1094 (1984).

acquainted with Michael Rapp, who had visited Cola's office in 1976 with respect to tax difficulties in Rapp's business. Rapp controlled Framingham S & S Corporation, which operated the Sea and Surf Restaurant in Framingham, Massachusetts. The restaurant was seriously delinquent in its payment of meals taxes owed to the Commonwealth. Cola was the attorney for the Commonwealth in charge of collecting such taxes.

Rapp also controlled a related corporation, Framingham Food Services, Inc., which was likewise tax delinquent, these being local property taxes owed to the town of Framingham. Cola was not assigned to collect such property taxes. The town, independently of any action by Cola, threatened to revoke the

restaurant's liquor license on December 31, 1979 if the property taxes were not paid. As the Massachusetts Appeals Court noted, the revocation of the liquor license would not only hamper the restaurant's future profitability, but was "an act calculated to case a pall over the New Year's revels of seven to eight hundred patrons expected by Rapp at that climactic hour." Commonwealth v. Cola, supra note 2 at 1097.

In order to avert this eventuality, Rapp filed a Chapter 11 petition for a reorganization, which the Bankruptcy Court granted. In addition to providing for the automatic stay sought by Rapp, the court assigned a federal trustee to oversee the operations of the restaurant. Naturally this situation was undesirable to Rapp for it

interfered with his previous autonomous control of his operations.

Rapp realized that he could probably persuade the Bankruptcy Court to remove the trustee if he could deposit with the court $30,000 to protect the business' unsecured creditors. At this point, Cola offered to loan Rapp the money in exchange for a $30,000 interest in a second mortgage on the real estate on which the restaurant sat. Cola arranged with his co-worker John Volpe for the mortgage to be held in the name of Utopia Realty Trust, of which Volpe was trustee. All this time Cola had been assigned to represent the Commonwealth's interests in the bankruptcy proceeding involving Rapp's restaurant.

The hearing on Rapp's motion to remove the trustee was held on January

8, 1980. Immediately prior to the hearing, in the hallway outside the courtroom, Cola delivered to Rapp's attorney a cashier's check for $30,000. Rapp's attorney then presented this check to the court. In response to the court's inquiry, the motion to remove the trustee was opposed by both a representative of the United States Internal Revenue Service and the trustee in the chapter 11 reorganization. The trustee later testified that Cola -- who was present throughout the hearing and who had previously been assigned to represent the Commonwealth interests therein -- stated to the judge that the Commonwealth had no objections to the removal of the trustee. Cola disputed this, asserting that he had remained silent and was merely in the courtroom as an observer on his lunch hour. Cola

further stated he did not represent the interests of the Commonwealth during the time he set aside for lunch. Respondents refer to this as Cola's "lunch hour defense."

The trustee was then removed by the court. Rapp eventually repaid the $30,000 to Cola six months later in June of 1980. The unsecured creditors, by contrast, were never paid. Rapp's tax debt continued to escalate at a rate of six to nine thousand dollars per month. In April of 1981, Rapp converted the chapter 11 proceeding to a chapter 7 liquidation. At that time, his unpaid tax obligation to the Commonwealth exceeded $400,000.

2. The $10,000 loan/payback

In September of 1980, while the chapter 11 proceeding was still pending,

Rapp again needed cash, which Cola volunteered to help him procure. It is disputed whether Rapp expressed his need for the $10,000 only after Cola called Rapp to collect a $2,000 payment due to the Commonwealth. Regardless of his motivation, Cola subsequently contacted John Volpe, who agreed to lend Rapp $10,000 in exchange for a $1,000 premium.

On September 10, 1980, Cola and Volpe brought the $10,000 in cash to the Sea and Surf restaurant and gave it to Rapp. Rapp, in a separate transaction with a gentleman named Garabedian, then exchanged the $10,000 plus some stock owned by Rapp for a $20,000 cashier's check provided by Garabedian. The cashier's check was made out to Cola. Rapp gave the check to Cola. Cola then went to a bank, cashed the check, and distributed the $20,000 as follows:

$2,000 to the Commonwealth of Massachusetts; $3,500 to Boston Edison; and the remaining $3,500 to Rapp in cash.

3. The indictment and bill of particulars

With the above background of the evidence presented at trial, we turn to consider one aspect of Cola's claim, that not only was the appellate theory of guilt at odds with the proof at trial, but that it was at odds with (and hence, not forewarned by) the indictment as narrowed by the bill of particulars. The "agency indictment" generally followed the language of the Massachusetts statute, and read as follows:

> NEIL R. COLA, a state employee, commencing at a time in or about the month of December, 1979 and continuing from time to time and on different occasions as opportunity

> therefore should offer until a time in or about the month of September, 1980 at Boston in the County of Suffolk, and at other diverse locations both within the County of Suffolk and without, while being a state employee not in the proper discharge of his official duties did act as agent or attorney for someone other than the Commonwealth in connection with a particular matter in which the Commonwealth and a state agency is a party and has a direct and substantial interest.[3/]

(Emphasis added).

3/ The statute under which Cola was convicted provided:

> "No state employee shall, otherwise than in the proper discharge of his official duties, act ... as agent ... for anyone in connection wih any particular matter in which the Commonwealth ... has a direct and substantial interest." Mass. Gen. Laws ch. 268A, §4(c).

Cola's motion for a bill of particulars requested that the prosecution make the following clarifications:

1. The identify of the party for whom the defendant is alleged to have acted as agent or attorney other than the Commonwealth.

2. The acts of the defendant which he performed as a state employee between December, 1979 and September, 1980 which were not in the proper discharge of his official duties.

3. The identification of the "particular matter" in which the Commonwealth was a party and had a direct and substantial interest as a "judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding."

4. The identification of the direct and substantial interest of the Commonwealth in the particular matter referred to in the indictment.

5. The means by which the Commonwealth alleges the offenses were committed.

(Emphasis added).

The Commonwealth answered as follows:

1. Michael Rapp, Framingham Food Services, Inc.

2. The defendant acted as a agent [1] for Framingham Food Services, Inc. in granting a second mortgage to Utopia Realty Trust ... [2] for Michael Rapp in obtaining a loan from one John Volpe [ad] ... [3] for Framingham Food Services, Inc. in the payment of debts of the corporation, other than to the Commonwealth.

3. The collection of taxes due the Commonwealth of Massachusetts.

4. The payment of taxes due the Commonwealth of Massachusetts.

5. The defendant's representation of the interests of Framingham Food Services, Inc. and one Michael Rapp.

   Further than this, the Commonwealth is unable to particularize at this time.

(Emphasis added).

The indictment and the bill of particulars must be read together and the indictment is limited by the government's clarifications. Commonwealth v. Leavitt, 17 Mass. App. Ct. 585, 595 (1984); Commonwealth v. Albert, 307 Mass. 239, 243 (1940). Cola's central contentions on appeal are two. First, he contends that nowhere in the indictment or in the bill of particulars did the Commonwealth allege that Cola's wrongful act of agency pertained to actions by him at the bankruptcy proceeding. Thus, since Cola's actions at the bankruptcy proceeding were, in his view, the appellate court's theory of guilt, he asserts that such theory was improperly omitted from the indictment (as narrowed by the bill of particulars.

Second, Cola argues that of the three acts of agency alleged by the government in paragraph "2", only the first two -- [1] that Cola acted as agent for Framingham Food Services, Inc. in granting a second mortgage to Utopia Realty Trust, and [2] that Cola acted as Rapp's agent in obtaining a loan from Volpe -- were the subject of the government's proof at trial. Cola further asserts that these two acts -- respectively, the $30,000 and $10,000 loan transactions described above -- were also the focus of the prosecutor's opening statement, his summation, and the thrust of the court's charge to the jury. Accordingly, Cola argues that the Commonwealth's theory of guilt on the agency indictment was based solely on the loan transactions.

The due process problem, argues Cola, arose in the course of his appeal. For the Massachusetts Appeals Court, in reviewing Cola's claims of error below, seems to have held that Cola's participation in the loan transactions was no crime at all. Rather, the crime was Cola's behavior at the bankruptcy proceeding where, by not protesting the removal of the trustee, Cola in effect acted as Rapp's agent.

Cola's argument, then, is not necessarily that his behavior at the bankruptcy proceeding was not a crime. Neither does he dispute the fact that evidence on the matter was before the jury. Rather, Cola claims that such evidence was incidental vis a vis the prosecutor's case or theory of guilt as presented to the jury. This theory of

guilt, argues Cola, was the loan transactions found by the state appellate tribunal to be no crime. Accordingly, citing the Massachusetts Appeals Court, Cola asserts that the acts or theory of guilt upon which he was tried did not constitute a crime. Further, citing Dunn v. United States, 442 U.S. 100 (1979), Cola asserts that the state appeals court, in upholding his conviction on a theory of guilt not presented at trial, violated his due process right to have such guilt determined on a basis set forth in the indictment and presented to the jury.

Before addressing Cola's claim and the government's rebuttal to it, we find it necessary to set forth the exact holdings of the Massachusetts Appeals Court and the district court below.

II. THE HOLDINGS OF THE MASSACHUSETTS APPEALS COURT AND THE DISTRICT COURT BELOW

A. The state appeals court

Cola's arguments to the state appeals court were essentially three: (1) he challenged the sufficiency of the government's evidence; (2) he claimed errors in the judge's instructions to the jury; and (3) he claimed error in denial of his motions for a required finding of not guilty as to each indictment. To support his view of error by the trial court, Cola alleged that the proof at trial and the judge's instructions focused on the loan transactions, acts which because they were allegedly never connected to a particular government interest in the collection of taxes, could not in Cola's

view be crimes under 4(c). Moreover, Cola objected to what he regarded as a theory of guilt concocted by the prosecutor only for purposes of the appeal; namely, that Cola's illicit act of agency was not only his particupation in the loan transactions but his "covert representation" of Rapp at the bankruptcy proceeding.

For purposes of this habeas petition, the relevant portions of the Appeals Court decision are those addressing Cola's objections to the judge's instructions and the legal and factual basis for the conviction under the agency indictment.

1. The judge's instructions

The Appeals Court rejected Cola's challenge to the Judge's instructions to

the jury on the ground that Cola's trial counsel had negotiated the content of the charge, apparently consented to it, and then remained silent when presented with two different opportunities at trial to object. Thus, citing the Massachusetts contemporaneous objection rule,[4/] the court noted that, given Cola's failure to object at trial, the only residual question would be whether the charge, viewed as a whole, would create a substantial risk of a miscarriage of justice. Commonwealth v. Cola, supra at 1099. While the court found certain defects in the charge, it nonetheless noted that the judge described the relevant statutes with reasonable accuracy, which "taken with the Commonwealth's powerful evidence,"

4/ See note 1, supra, for text of rule.

led the court to conclude it unlikely the jury had been misled by any defects. Id.

2. The agency indictment

The appellate court began this portion of its opinion by restating, in its words, the essence of the prosecutor's case as supported by the evidence at trial: that "Cola acted for Rapp and S & S (i.e., someone other than the Commonwealth) to minimize and delay the payment of state taxes (i.e., a particular matter in which the Commonwealth had a direct and substantial interest) ..." Id. at 1101. This "tax minimization" role of Cola's, which the court rgarded as satisfying the elements of the agency indictment, was established in the

court's view by the following three acts of Cola:

> ... [1] by filing returns for [Rapp] calculated to keep the tax collector at bay; [2] by encouraging discharge of the trustee in the c. 11 reorganization, who was paying taxes; and [3] by passing up opportunities to apply the loan proceeds to the reduction of tax arrearages.

Id.

The court proceeded to notice a "difficulty." This was that the Commonwealth, both in its bill of particulars and in its theory of guilt as evidenced by the prosecutor's opening and summation, did not emphasize the acts regarded by the appellate court as most clearly constituting a crime. Rather, the court noted, the Commonwealth appeared to focus solely on the $30,000 and $10,000 loan

transactions, as though Cola's participation in these, by itself, would constitute a 4(c) violation. Id. But Cola's participation in the loan transactions, under the Appeals Court opinion, did not constitute criminal conduct. The theory of guilt based on the loan transactions, said the Appeals Court, was "faulty."[5/] Id. at 1101-1102.

The Massachusetts Appeals Court was then faced with a dilemma. On the one

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5/ We are bound to apply a state appellate court's statement of local law. See Tarrant v. Ponte, No. 84-1392, slip op. (1st Cir. Jan 4, 1985); Missouri v. Hunter, 51 U.S.L.W. 4093, 4096 (Jan. 19, 1983); O'Brien v. Skinner, 414 U.S. 524, 531 (1974). We therefore are compelled to accept that, given the Appeals Court opinion, Cola's participation in the loan transaction was not a crime under §4(c).

hand, it had conceded that the focus of the government's proof had been the loan transactions, and that the theory of guilt based on such transactions was "faulty." So, the bulk of Cola's trial focused on noncriminal behavior. On the other hand, the Appeals Court reviewed the record and found testimony regarding acts committed by Cola that did constitute a crime, namely, his failure to object to the removal of the trustee and consequent covert representation of Rapp at the bankruptcy proceeding. Hence the dilemma, for under Dunn v. United States, supra, it is a violation of due process to affirm a conviction on a basis neither set forth in the indictment nor presented to the jury at trial. Thus, the Appeals Court, to survive scrutiny under Dunn, had to

establish that its theory of guilt -- covert or dual representation at the bankruptcy proceeding -- was indeed set forth in the indictment and was presented to the jury as a focus of the government's case.6/

As to whether Cola's actions at the bankruptcy proceeding were the subject of the indictment as narrowed by the bill of particulars, the appellate court points to the third item mentioned in the bill of particulars, that Cola "acted as an agent for Framingham Food

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6/ As elaborated in Part IV below, we reject an interpretation of Dunn, suggested by the Commonwealth here, that it suffices to find the appellate theory in the indictment or the proof at trial. Rather, we regard Dunn as requiring both.

Services, Inc. in the payment of debts of the corporation, other than to the Commonwealth." Id. at 1102. Properly noting the identity of interest and arguably sham distinctions between all the Rapp corporations, the Appeals Court read the above quote as in effect stating that Cola had generally acted as Rapp's agent (and not merely the agent of Framingham Food Service, Inc.) in the payment of debts other than to the Commonwealth, a general concept within which the actions at the bankruptcy proceeding were apparently included. Id.

Having satisfied itself that the indictment, as narrowed by the bill of particulars, stated the crime with sufficient specificity, the Appeals Court proceeded, without elaborating on the context, to summarize the

prosecutor's case as follows:

> In outlining the theory of the government's case in his opening... the prosecutor said the evidence would show Cola was not collecting delinquent taxes, that Cola represented the interests of the Commonwealth in the Bankruptcy Court proceedings at the same time that he procured funds for Rapp's corporation and produced them at the Bankruptcy Court in a context disadvantageous to the Commonwealth's tax collection efforts, and that through his actions the Rapp interests received favorable treatment in the tax collection proceedings. When he summarized the evidence in his closing, the prosecutor argued expressly that the evidence had demon strated that Cola had represented "the interests of S & S and Michael Rapp" at the Bankruptcy Court on a date when it was his obligation "to represent the interests of the

> [S]tate" and that, more generally, the evidence had shown "that while Mr. Cola was a representative of the Commonwealth, a [S]tate employee, he acted on behalf of Michael Rapp...[Paraphrasing the statute], he acted as an agent for someone other than the Commonwealth in a particular matter in which the Commonwealth has an interest.

Id. at 1102.

The above characterization of the prosecutor's case led the court to conclude that Cola had indeed been tried on a theory of guilt based on his actions at the bankruptcy proceeding, a theory that, to the apparent exclusion of any other, would be adopted by that court on appeal.

Cola's argument in this habeas petition, then, is simply to challenge the Appeals Court's finding that the

dual representation theory of guilt, based on his actions at the bankruptcy proceeding, was indeed before the jury. Moreover, Cola challenges the finding that the appellate theory was encompassed by the indictment as narrowed by the bill of particulars. Before addressing these issues, it is first necessary to set out the resolution offered by the district court below.

B. The district court opinion

Cola's habeas claim to the district court was essentially the same as that before us. Cola argued that the Appeals Court affirmed his conviction under §4(c) on a thoery of guilt not specified in the indictment, bill of particulars, prosecutor's opening or summation, or the judge's charge to the jury. Each of

these elements of the trial, Cola argued to the district court, revealed the government's central theory of guilty -- and in turn the only case before the jury -- as focusing on the loan transactions as violative of §4(c), and not on the "dual representation" theory, which in Cola's view, the Appeals Court wrongly concluded to have been set forth at the trial.

In the early portion of its opinion, the district court appeared to reject the Appeals Court finding that the case was presented to the jury so as to direct their attention to Cola's dual representation at the bankruptcy hearing. Cola v. Reardon, No. 85-225-S, slip op. at 6 (D.C. Mass. March 26, 2985). In short, the district court found that, contrary to the Appeals

Court's assertions, the proof at trial for the most part focused on the loan transactions by themselves, and not on the bankruptcy proceeding. Id. Additionally the district court noted that the judge's charge, while again focusing on the loan activity, was in fact so vague that the jury returned with the following question:

> If, now that we have heard all the testimony and the charge to the jury, are we free to decide guilt or innocence on any basis whatsoever (except, of course, for being paid off for a vote)?

Id.

Despite its apparent conclusion that the case presented to the jury did not focus on conduct found by the Appeals Court to be criminal -- and by implication, that the Appeals Court

unconstitutionally affired Cola's conviction on a basis not set forth at trial -- the district court denied Cola's petition in a three-step argument, respectively addressing: (1) the indictment as narrowed by the bill of particulars; (2) the prosecutor's opening and closing; and (3) the judge's charge to the jury.

1. <u>The indictment as narrowed by the bill of particulars</u>

Regarding the indictment as narrowed by the bill of particulars, the district court noted Cola's second request in his motion for particulars:

> 2. The acts of the defendant which he perfomred as a state employee...which were not in the proper discharge of his official duties.

As noted above, the Commonwealth responded to this with its restatement of Cola's acts in the two loan transactions as the imporper acts of agency, as well as a third act, relied on by the Appeals Court, that Cola had acted as an agent for one of Rapp's corporations in paying debts other than to the Commonwealth.

The district court, however, did not adopt the Appeals Court conclusion that the third act encompassed the "dual representation at the bankruptcy proceeding" theory. Rather, the district court held that, because Cola's request was not directed to the operative words of the charge, the Commonwealth's reply did not operate to

limit the scope of the indictment.[7/]

Any miscommunication between Cola and the government was clarified, in the district court's view, by Cola's fifth request in his motion for a bill of particulars:

> 5. The means by which the Commonwealth alleges the offenses were committed.

7/ To arrive at this conclusion, the district court noted the statement in the indictment, "while being a state employee not in the proper discharge of his official duties did act as agent," and characterized the phrase "did act as agent" as the operative words of the charge. Thus, when Cola inquired as to acts "not in the proper discharge of his official duties," he was inquiring as to acts which are not necessarily crimes without the additional notion of agency. Id. at 7-8.

The Commonwealth responded:

> 5. The defendant's representation of the interests of Framingham Food Service, Inc. and one Michael Rapp.

The district court then asserted that the Appeals Court was correct in stating that "there was ample evidence of violations of §4(c) which were within the scope of this specification." Id. at 8. Regrettably, the district court did not explain what "the scope of this specification" was, or more particularly, whether the specification, in alleging "representation" as the illegal act of "agency," did anything more than vaguely restate the indictment. Apparently, in the district court's view, adequate notice of the

appellate theory was a foregone conclusion.[8/] Instead, the district court viewed the issue before its as whether "ample evidence" had been presented at trial to support the appellate theory. Even on this latter issue, the district court did not state what this "ample evidence" was nor did it reveal how such ample evidence was related by the prosecutor to the Appeals Court "dual representation" theory. Finally, the district court did not explain how such a conclusion -- i.e., ample evidence as to the dual representation theory -- could be reconciled with its earlier assertion that the proof at trial predominantly focused on the noncriminal

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8/ We address this issue in Part IV below.

loan tranactions. Instead of addressing any of these issues, the district court abruptly concluded that "[t]here was, accordingly, no variance between the indictment as limited, the proof at trial, and the basis on which the Appeals Court upheld the conviction." Id.

2. The prosecutor's opening and closing

Presumably, in his arguments before the district court, Cola noted that, under Dunn v. United States, supra, examination of the prosecutor's closing statement (and by implication, also his opening) was proper as a means of determining whether the appellate theory of guilt was indeed before the jury. As to the prosecutor's opening, the district court felt it did reflect the appellate theory, and hence did not

regard it as presenting any problems under Dunn, for two reasons. First, although the district court had earlier characterized the prosecutor's references to the bankruptcy proceeding as "passing," it nonetheless concluded that "[i]t is arguable at least that the last 15 lines encompassed the matters which the Appeals Court found supported the conviction." Thus, the district court implicitly regarded "arguable" references by the prosecutor to the appellate court theory as satisfying the Dunn requirement that the appellate theory correspond to the proof at trial. Second, the district court concluded, without citation, that any deficiency -- presumably even a deficiency under Dunn -- was waived because the sufficiency of the opening

statement was never challenged by a motion for a required finding of not guilty. Id. at 9. In arriving at this conclusion, the district court did not address Cola's contention that the constitutional error to which he objected -- an appellate tribunal affirmance on a theory not set forth at trial -- had not yet occurred, and that therefore, to impose upon Cola the obligation to object prior to any constitutional error would be to require unrealistic powers of foresight.

As to the prosecutor's closing argument, the district court again noted any connection to the Appeals Court theory to be tenuous. The court regarded the connection, if any, to be "almost exclusively" to the loan transactions by themselves. Id.

Despite these observations, the district court could find no requirements for closing arguments apart from the prohibition against improperly prejudicial statements. Accordingly, it concluded that the prosecutor could well have waived closing or sung "Columbia, the Gem of the Ocean" without affecting the legal sufficiency of the case presented to the jury. Id. By implication, we suppose, the district court rejected Cola's contention that "Columbia, the Gem of the Ocean" was all anyone had sung at his trial, and that, therefore, to affirm on a different theory of guilt would violate due process.

3. The judge's charge to the jury

The district court plainly states that the judge's charge to the jury only

focused on Cola's actions with respect to the loans, and hence, did not address criminal behavior. Id. at 9, 11. However, on this issue the district court followed the Massachusetts Appeals Court, and, citing the state's contemporaneous objection rule, noted that any right of Cola's to object to the trial court's instructions on appeal was waived by his failure to object at trial. Thus, stated the district court, Cola's failure to object at trial, absent a showing of cause and prejudice, precluded him from challenging the jury instructions in a petition for habeas corpus. See Wainwright v. Sykes, 433 U.S. 72 (1977); McLaughlin v. Gabriel, 726 F.2d 7, 9 (1st Cir. 1984)). Accordingly, because the district court found no showing of cause as required by

the above cases, it disallowed Cola's claim. Id. at 10. In conclusion, however, the court noted that were it not for its application of the contemporaneous objection rule, it would have granted Cola's writ, since the charge clearly indicated the case presented to the jury to be one focusing solely on the noncriminal loan transactions. Id. at 11.

III. ANALYSIS

We begin by noting that Cola's habeas petition, which in essence asserts a due process claim, is not beore us under our federal supervisory powers. Rather, Cola challenges a state appellate tribunal's affirmance of his conviction. Given that federal courts have no supervisory powers over state judicial proceedings, federal

intervention is not proper here to correct mere imperfections but only to correct "errors of constitutional dimension." See, Lacy v. Gabriel, 732 F.2d 7, 12 (1st Cir. 1984); Smith v. Phillips, 455 U.S. 209, 221 (1982).

The similarities between the present case and Dunn v. United States, supra, are worthy of notice. Dunn involved a federal perjury statute, Title IV of the Organized Crime Control Act of 1970, 18 U.S.C. §1623, which prohibits false declarations made under oath "in any proceeding before or ancillary to any court or grand jury of the United States." The issue, apart from the due process discussion, was how to define "ancillary" proceedings such that false statements made would subject the declarant to §1623. Thus, as with

the present case, Dunn originated with a debate over how to define criminal conduct.

Along with the background of a statute subject to differing interpretations, the defendant Dunn, similar to Mr. Cola, had committed more than one act. Dunn had essentially lied on two occasions, once in a lawyer's office on September 20 and again in an October 21 evidentiary hearing where, for the most part, he adopted the September 30 statements.

The indictment charging Dunn with perjury under §1623 mentioned only the September 30 statement, and not the statement of October 21. At trial, the government centered its proof on the September 30 statement. The government also presented evidence, although not

significant, on the October 21 statement.[9] Unlike Cola, Dunn objected at trial to the admission of the October 21 statement and renewed his objection in a motion for acquittal. To support this latter motion, Dunn's argument was similar to Cola's in the state appeal. Dunn contended that the September 30 statement, the focus on proof at trial, was not made in the requisite "ancillary proceeding," and hence, was not a crime at all.

On appeal, the Tenth Circuit agreed with Dunn that the September 30 statement was no crime. However, noting

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9/ This evidence was in the form of rebuttal to Dunn's assertion that he had not made the September 30 statement.

the September 30 and October 21 statements to be "inextricably related," the court concluded that Dunn had clearly been on notice as to the latter, and that therefore, any variance between the indictment (only September 30) and the proof at trial (September 30 and October 21) was not fatal.

The Supreme Court, in reviewing the Tenth Circuit's decision, disapproved of any characterization of the issue as a variance issue. Indeed, because the Court regarded the proof at trial as centrally focusing on the September 30 statement, it saw no variance at all. Both the indictment and the proof at trial involved September 30. The problem involved fundamental due process concepts of notice and trial by jury, which led the Court to state:

To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. See Eaton v. Tulsa, 415 U.S. 697, 698-699 (1974) (per curiam); Garner v. Louisiana, 368 U.S. 157, 163-164 (1961); Cole v. Arkansas, 333 U.S. 196, 201 (1948); DeJonge v. Oregon, 299 U.S. 353, 362 (1937). There is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. But the offense

> was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.

Id. at 106-107.

We are hard-pressed to distinguish the present case from Dunn. Frankly, we also see "no glaring distinction" between the theory of the Massachusetts Appeals Court and the proof at trial. The "dual representation" appellate theory can be adduced from the facts. But it was not the government's focus, or as Dunn requires, "the theory on which the case was tried and submitted to the jury." Id. at 106. Reference to the dual representation theory, if ever made explicit, was only incidental. The Dunn Court regarded tangential references to

the October 21 statement as insufficient because, in the Court's view, the prosecution did not "build its case" on such evidence. Id. Subsequently, in Chiarella v. United States, 445 U.S. 222 (1979), the Supreme Court regarded isolated phrases or side-references to the appellate theory as also constitutionally insufficient. Id. at 237, n.1, and at 239 (Brennan J., concurring). Thus, we believe that, in order for any appellate theory to withstand scrutiny under Dunn, it must be shown to be not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt that, upon reviewing the principal stages of trial, can be characterized as having been presented in a focused or

otherwise cognizable sense.[10]

Accordingly, while we concede that evidence supporting the dual representation theory was before the jury, we cannot find any basis for concluding that the prosecution "built its case" on such evidence. In short, no meaningful attempt was made to relate the evidence to the theory adopted on appeal. Thus, the evidence supporting the appellate theory, as well as the appellate theory itself, were at best

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10/ We find the district court's tentative statement of the rule also quite helpful: "the case . . . [must have been] presented to the jury in a manner which directed their attention to the conduct which the Appeals Court found violative of the statute." Cola v. Reardon, supra at 6. The district court noted that this had not been done but nonetheless ruled for the Commonwealth. Id at 6, 11-12.

incidentally present, or better put, not coherently present at all.

We arrive at the conclusion that the Massachusetts Appeals Court's theory was only incidentally before the jury based on the very analysis set forth in Dunn and Chiarella. While the Court in Chiarella focused largely on the judge's charge, the Dunn Court, in order to determine the exact case or theory of guilt presented to the jury, looked to both the summations of the prosecutor and defense counsel as well as the judge's charge to the jury. Because we view the essence of any inquiry under Dunn as addressing the principal stages of trial -- i.e., that which constitutes "the theory on which the case was tried and presented to the jury" -- we will, in addition to reviewing the

prosecutor's summation and the judge's charge, somewhat broaden our inquiry to include the prosecutor's opening statement.[11/]

1. The prosecutor's opening and closing statements.

The Massachusetts Appeals Court found that the prosecutor, in his opening and summation, adequately presented the dual representation theory

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11/ We note that because we find the appellate theory not to be meaningfully present in any of the principal stages of trial, we need not decide the issue of whether certain stages, specifically, the judge's charge and the prosecutor's summation, deserve more scrutiny or weight than others. However, we do decide that, in order for evidence supporting the appellate theory to be given weight, such evidence must be related by the prosecutor to the appellate theory, and not left unexplained. See pp. 46-48, infra.

of guilt. We disagree. As to the prosecutor's opening, we agree with the district court below that the references to the bankruptcy proceeding were at best arguable. We discern no difference between the "arguable" references here and side-references. Accordingly, because as a matter of law mere side-references by the prosecutor do not suffice to place a theory before the jury, we conclude that the prosecutor's opening was constitutionally infirm. See, Dunn, supra at 106-107, and see also Chiarella, supra at 237 n.1, 239 (Brennan, J., concurring) ("[a]mbiguous suggestions in the indictment and the prosecutor's opening and closing remarks are no substitute for the proper instructions").

As to the prosecutor's closing, we again reject, for reasons stated more fully in Part IV below, the Appeals Court's paraphrasing of the prosecutor's statements, which in our view disguises the import and incidental nature of the references to the bankruptcy proceeding. Moreover, as to the district court's justification for not considering what it regarded as a summation "almost exclusively" addressing noncriminal conduct -- that, except for the prohibition on prejudicial statements, the prosecutor is largely unrestricted in his summation -- we cannot agree in this instance. The summation is one of various factors that must be considered in inquiries under Dunn as to the case before the jury. Thus, while prosecutors may be

free to waive closing or sing "Columbia the Gem of the Ocean," they must beware when such becomes the nature of their case, and especially, when such is not the case affirmed by an appellate tribunal.

2. The judge's charge to the jury

As to the judge's charge to the jury, we note that the judge in Dunn, similar to Cola's judge, most competently described the statute at issue. However, also like Cola's judge, the trial judge in Dunn proceeded to discuss t he noncriminal acts alleged by the prosecution in its indictment, thus implying that these could serve as the basis for a guilty verdict. Finally, as in Chiarella, the judge in Cola's trial tangentially referred to the conduct later found by the Appeals Court to be

criminal; however, we reiterate that an isolated phrase in the instructions, which arguably implies the appellate theory, does not suffice to present the appellate theory to the jury. Id. at 237 n.1. Thus, under both Dunn and Chiarella, the judge's charge here did not sufficiently reflect the appellate theory.

We now come to perhaps the most central error committed by the Appeals Court and the district court below, for while both looked upon the trial judge's instructions as not framing the issues in a manner that would define criminal conduct, both precluded Cola from raising any objection on appeal due to his failure to so object at trial. The Massachusetts Appeals Court in part properly applied the contemporaneous

objection rule, since, at that level of the proceedings, Cola's objection was partly to the charge itself. However, the Appeals Court should have noted Cola's further objection to a theory of guilt that, in Cola's view, the prosecutor had concocted solely for the purposes of appeal. Accordingly, it was incumbent upon the Appeals Court to apply the aforementioned inquiry under Dunn, where different principal stages of the trial -- such as the prosecutor's summation and the judge's charge to the jury -- are examined not for the purpose of finding inherent error but for resolving the "evidentiary" inquiry of determining the exact case before the jury.

In short, to apply the contemporaneous objection rule to due process challenges under Dunn is to

misunderstand the nature of the error complained about. In the traditional contemporaneous objection situation, the error inheres in the judge's charge; thus, it is reasonable to require objection at the time of the error. In the Dunn situation, however, the error inheres in the appellate court affirmance; thus, the error has not yet occurred at the time of the judge's charge. Accordingly, to require defendants to object to appellate tribunal errors prior to the appellate opinion itself is, in our view, to impose unreasonable demands of foresight.[12/] See, e.g.,

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12/ This is especially so where as here and as in Chiarella, the appellate court's theory of guilt involves a novel or otherwise not easily anticipated view of criminal liability.

Dlugash v. State of New York, 476 F. Supp. 921, 925 (E.D.N.Y. 1979).

We note that, in Chiarella, the Supreme Court eschewed affirmance upon concluding that certain factors, such as an unobjected judge's charge, indicated the theory at trial to be contrary to that offered on appeal.[13/] Thus, the Massachusetts Appeals Court should likewise have taken cognizance of the unobjected judge's charge as evidence of the case before the jury, and, in our

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13/ Chief Justice Burger in his dissent noted that "experienced defense counsel" did not object to the charge. Id. at 244. None of the other justices, however, mentioned this as relevant. Indeed, given the focus of the majority on the charge as evidence of the case before the jury, it seems clear that, probably for the reasons elaborated above, they viewed the lack of objection at trial as immaterial.

view, concluded that the Commonwealth's proposed theory on appeal was, unfortunately, a novel one with respect to the trial.

Consideration by us of the charge, then, is not for the purpose of finding error in it, but rather, in the limited context of due process challenges under Dunn, to determine the nature of the case before the jury, a determination that we note is only partially affected by the charge itself. Accordingly, the reliance of both the Appeals Court and the district court on the state contemporaneous objection rule was erroneous. Regrettably, such reliance prevented at least the district court from pursuing its inclination to find error in the appellate court affirmance based on a theory not set forth at trial.

IV. ISSUES RAISED BY THE COMMONWEALTH

Apart from asserting that Appeals Court's "dual representation" theory of guilt was before the jury, the Commonwealth posits four other reasons for us to deny Cola's habeas petition. First, the Commonwealth offers an interpretation of Dunn whereby due process would be satisfied if either the indictment or the proof at trial corresponds to the appellate theory; thus, because the Commonwealth regards the indictment as encompassing the appellate theory, it urges us to uphold on that basis alone. Second, the Commonwealth points out that on habeas review, our role is only to correct errors of constitutional dimension and not mere inperfections; thus, since Cola's claim is allegedly a complaint against mere imperfections, we should

not grant his petition. Third, the Commonwealth asserts that the Appeals Court's conclusion -- that its theory of guilt was before the jury -- is a "finding of fact" entitled to a presumption of correctness under 28 U.S.C. § 2254(d), and more importantly, that the record does not reveal such presumption to be overcome. Fourth, the Commonwealth argues that it can invoke and prove both of the permitted rebuttals to traditional "variance" claims of defendants, i.e., (i) that Cola was nonetheless on notice of the dual representation theory and, accordingly, prepared an adequate defense, and (ii) that Cola is protected from being retried for the same offense. We address each of the above claims in turn.

1. Whether the indictment, if it touches upon the appellate theory, can by itself defeat a due process challenge under Dunn.

The Commonwealth's claim here is twofold: first, it asserts that the indictment, as narrowed by the bill of particulars, encompassed the appellate theory; and second, it argues that, accordingly, the indictment by itself can defeat a due process challenge under Dunn.

We believe that assertions as to a nexus between the indictment and the appellate theory are soundly refuted by examining the disagreement between the Appeals Court and the district court as to where in the bill of particulars the appellate theory can be found.[14/]

14/ As noted above, the Appeals Court relied on the third alleged act of

(footnote continued)

Although we accept the conclusion

(footnote continued)

agency set forth in paragraph 2, that Cola had acted as an agent for one of Rapp's corporations in the payment of debts other than to the Commonwealth. This statement, in the Appeals Court's view, encompassed its tax minimization theory, as well as the act of dual representation at the bankruptcy proceeding.

The district court, perhaps because it accepted Cola's contention that the above third act of agency did not encompass the appellate theory, chose not to follow the Appeals Court reasoning and held that none of paragraph 2 -- which included references to the $30,000 and $10,000 transactions -- could be regarded as limiting the scope of the indictment "because the request was not directed to the operative words of the charge." Id. at 8. The real particularization of the agency indictment, said the district court, could be found in the Commonwealth's statement in paragraph 5, that the illicit act of agency was "[t]he defendant's representation of the interests of Framingham Food Services, Inc. and one Michael Rapp." Id. In other words, the district court concluded that the relevant particular was not the paragraph involving the $30,000 and $10,000 loan transactions (which essentially were the focus of all the proof at trial), but rather, that it

(footnote continued)

of the Appeals Court that paragraph 2 provides the relevant particular, we reject the conclusion that the third alleged act of agency in paragraph 2 -- the payment of the debts of one of Rapp's corporations other than to the Commonwealth -- encompasses the appellate theory.[15/] The reason for

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(footnote continued)

was a paragraph stating that the defendant's illicit acts of agency were his acts of representing Rapp (or, his acts of agency). Thus, because we do not see the redundancy of paragraph 5 as providing any meaningful particularization of the indictment, and because we, therefore, regard the statements in paragraph 2 as providing more relevant notice, we reject the district court's contention that paragraph 5 should be our focus and that it encompasses the appellate theory.

15/ The full text of the bill of particulars (including paragraph 2) is set forth at p. 10, supra.

our conclusion is that, in order to deduce a connection between this third act of agency and Cola's actions at the bankruptcy proceeding, one must engage in too many cognitive leaps. The real restatement of the indictment with a hint that the trial invovles Rapp's corporate tax debt, or, it is a second reference to the $10,000 loan transaction, where Cola distributed the proceeds of a $20,000 check to various parties and only in part to the Commonwealth. In neither case, however, do we see a persuasive link to the tax minimization theory, and certainly not to Cola's actions at the bankruptcy proceeding (the latter arguable being the crux of the appellate

theory).[16]

Even if we were to accept the Appeals Court's conclusion that the third alleged act of agency set forth in paragraph 2 implicitly encompasses the appellate theory, we nonetheless hold that Dunn requires the appellate theory to be set forth in both the indictment and the case presented to the jury. The relevant statement in Dunn is the following:

16/ As noted below, the Commonwealth repeats this assertion of notice to Cola by arguing a contention not explicitly accepted by either of the courts below, that all along Cola expected and effectively defended against the appellate theory. Since our review of the record indicates that Cola's defense does not indicate knowledge or constructive notice of the appellate theory, the Commonwealth's assertion that the indictment provided actual notice is, in our view, even more suspect.

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to the jury at trial offends the most basic notions of due process.

(Emphasis added). Id. at 106.

The Commonwealth interprets the above quote as only requiring the appellate theory to be present either in the indictment or in the proof at trial. Thus, argues the Commonwealth, so long as the appellate theory is mentioned in the indictment, convictions could be upheld despite the total lack of proof or argument by the prosecutor on such theory at trial. In short, prosecutors could sing "Columbia the Gem of Ocean," never mention the appellate theory at trial, and still obtain a conviction by concocting their real case on appeal. Under the Commonwealth's

view, such a prosecutorial waiver of trial would not violate due process, since the only process allegedly due to defendants is to have the appellate theory set forth in the indictment. This cannot be the law, for in addition to notice, due process requires a trial in which criminal defendants are able to confront the government's case. See Jackson v. Virginia, 433 U.S. 307, 314 (1978) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process.") (emphasis added); see also Cole v. Arkansas, 333 U.S. 196, 201 (1947). Thus, to allow appellate affirmance of convictions without inquiry as to the proof at trial is to seriously risk denials of due process, nothwithstanding the signals

given by the government in its pretrial indictment.

Our view of the requirements of due process is, of course, by no means novel. However, it is also important to note that our conclusion follows not only from Dunn but from Chiarella, where, in addition to being concerned with concepts of notice, the Court indicated a like concern for sixth amendment guarantees of confrontation and trial by jury. Thus, in explaining its reluctance to give weight to incidental, side-references at trial to the appellate theory, the Chiarella Court stated the proposition that courts may not uphold convictions if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct. Id. at 237 n.1

citing United States v. Gallagher, 576 F.2d 1028, 1046 (3rd Cir. 1978); Leary v. United States, 395 U.S. 6, 31-32 (1969); Stromberg v. California, 283 U.S. 359, 369-370 (1931). The reason for such a proposition, we believe, and the reason Dunn requires the appellate theory to be present in the indictment and the proof at trial, is a fundamental sixth amendment concern that guilt be initially adjudicated before a jury based on the government's case as presented at trial.

Accordingly, because we regard due process as requiring the appellate theory to be set forth in both the indictment and the proof at trial, and because we find the references at trial to the appellate theory to be at best incidental, we reject the Commonwealth's

contention that due process can be reinstated through references (here implicit) to the appellate theory in the indictment. Finally, we note that this conclusion, as well as our conclusion that the indictment provides no meaningful notice of the appellate theory, are endorsed by the Supreme Court in Dunn. There, the basis of the Tenth Circuit's affirmance was that, while the indictment did not specifically mention the acts found criminal on appeal, adequate notice and an opportunity to defend could nonetheless be implied, given that the act mentioned in the indictment was "inextricably related" to that found criminal on appeal. The Supreme Court rejected this analysis out of hand, its reason essentially in the indictment,

the proof at trial corroborated a more plain reading of the document, which did not at all encompass the appellate theory. Thus, at the least, the Supreme Court endorsed a rule that, where the proof and elements of trial clearly do not reflect the appellate theory, the constitutional infirmity cannot be overcome by transcendental views of the indictment's message. Because we do not think the prosecution's case at trial reflected the appellate theory here, and because we regard the Commonwealth's interpretations of the indictment to be at best transcendental, we need go no further here than the holding in Dunn. Accordingly, we merely reiterate that where the prosecution's case at trial does not meaningfully reflect he appellate theory, due process cannot be

reinstated through implicit references in the indictment.

2. Whether the error involved in this habeas petition is of constitutional magnitude

As noted above, our role in reviewing habeas petitions from state tribunals is only to correct errors of constitutional magnitude, and not "mere imperfections." See Lacy v. Gabriel, supra; Smith v. Phillips, supra. We have here found a violation of due process under Dunn. The Dunn Court referred to the error before it as offending one of "the most basic notions of due process." Dunn, supra at 106. Such violations, in our view, are errors of constitutional dimension. Accordingly, we reject the Commonwealth's contention here.

3. The Appeals Court decision and the presumption of correctness § 2254(d)

The Commonwealth's basic claim here is that the Appeals Court's conclusion -- that its theory of guilt was submitted to the jury -- is a "finding of fact" entitled to a presumption of correctness under 28 U.S.C. § 2254(d) and Sumner v. Mata, 455 U.S. 591 (1982). We agree, for purposes of argument, that the inquiry under Dunn as to the "theory of guilt" before the jury could be characterized as a factual matter.[17/] Even assuming a

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17/ We also note, however, that the "facts" found by the Appeals Court were statements by witnesses regarding Cola's action at the bankruptcy proceeding and side-references by the prosecutor and the trial judge to the appellate theory. These statements or "facts" are in the record before us just as they

(footnote continued)

presumption of correctness is attached to the Appeals Court finding, we nonetheless reject the Commonwealth's argument on two grounds. First, as a matter of "fact", we find that any presumption is overcome by significant

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(footnote continued)

were before the Appeals Court, in finding its theory of guilt to be "before the jury," was in effect attaching legal significance to facts not in dispute in this habeas petition. In other words, the Appeals Court's finding that its theory had been submitted to the jury could be characterized as a legal one involving analysis, supposedly under Dunn, of the due process significance of undisputed statements made by witnesses, the prosecutor and the judge. However, instead of entering the legal quagmire of questions of fact versus questions of law and "mixed" questions, we prefer here to give the Commonwealth the benefit of any doubt, and, given the separate sovereignty implications of federal habeas review of state tribunals, will accord the Appeals Court's finding a presumption of correctness under § 2254(d).

evidence -- some of which the Appeals Court improperly regarded as not before it, and the rest of which the Appeals Court paraphrased out of context -- indicating that the case was presented only in terms of the loan transactions. Second, as a matter of law, even accepting the finding, essential to the Appeals Court's conclusions, that there was ample evidence before the jury corroborating the appellate theory, we hold that, absent a presentation by the prosecutor relating such evidence to the appellate theory, due process is nonetheless abridged.

As to our first point, we note that the Appeals Court, because it applied the state contemporaneous objection case before the jury. However, we have

already concluded that, in inquiries under Dunn as to the case before the jury, consideration by us of the charge is both proper and required. Accordingly, our conclusion that the case before the jury did not involve a focus on the appellate theory is based on a consideration of evidence that the state appellate tribunal improperty regarded as not before it.18/

18/ The fact that the trial judge's charge presented the wrong theory of guilt, and the impact of that charge on the case before the jury, is revealed by the district court's final observation that, were it not for the contemporaneous objection rule, it would grant Cola's writ. Cola v. Reardon, supra, at 12. In Chiarella, likewise, the Court's conclusions as to the case before the jury were largely, if not solely, based on the judge's charge. Chiarella, supra, at 231, 236.

Thus, while we do not opine here as to the relative weight to be attributed

(footnote continued)

In addition to our consideration of the judge's charge, we regard any § 2254(d) presumption overcome as a factual matter based on our independent review of the record. As to the prosecutor's closing argument, we note that, upon close examination of the brief references to the bankruptcy proceeding, it becomes clear that these references were made in the context of the financial interest indictment, and not in the context of the agency

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(footnote continued)

to the judge's charge as affecting the case before the jury, we nonetheless note that Chiarella and the district court's observations bolster both (i) our interpretation of the charge as not effectively setting forth the appellate theory, and (ii) our conclusion that the charge, when accepted as evidence of the case before the jury, can significantly impact upon a court's conclusions, and thus, casts serious doubt over those of the Appeals Court.

indictment. Thus, the prosecutor's references to the bankruptcy proceeding were not only brief, but were never related, as the Appeals Court said they were, to the agency indictment context. Accordingly, we agree with the observation of the district court that the prosecutor's closing statement makes no plain reference to the appellate theory, or, that if any reference can be inferred, it is at best incidental. Since, as a matter of law, incidental references by the prosecutor to the appellate theory do not suffice to place the case before the jury, we reject the propriety of the Appeals Court's conclusion, despite § 2254(d).

As to the prosecutor's opening statement, we once again note that the context is not clearly that of the

agency indictment, and moreover, that a reading of the statement simply does not communicate the appellate theory. Thus, although we are inclined to find no connection to the appellate theory, we are willing to adopt the generous view of the district court that a nexus is "arguable." However, we again conclude that, as a matter of law, arguable or incidental references do not survive due process scrutiny, and that, accordingly, any presumption under § 2254(d) is soundly overcome.

We now come to our second point, which addresses a "factual" finding substantially relied upon by the Appeals Court and the district court below. In short, both courts (and especially the Appeals Court) concluded that admitted flaws in the prosecutor's presentation

and the judge's charge could be overcome by "ample evidence" supporting the appellate theory. Thus, assuming we accept the factual contention of ample evidence supporting the appellate theory, the legal issue is whether, given such ample evidence, due process would be preserved despite a presentation by the prosecutor and instruction by the judge that do not clearly relate such facts to the appellate theory.

As a preliminary matter, we note our disagreement with any contention that there was "ample" evidence supporting the appellate theory. In the total context of the trial, reference to the bankruptcy proceeding -- and especially, to Cola's nonobjection to the removal of the trustee (the act of dual

representation) -- was at best limited, especially when compared to the voluminous discussion of the loan transactions. Even accepting, however, the Appeals Court's finding of ample evidence, we do not, under the circumstances of flawed relation of such facts to the appellate theory of guilt, regard due process as having been preserved.

The question, as noted above, was answered by the Supreme Court in Dunn. There, the Court noted that while evidence fully supporting the appellate theory had been before the jury, the prosecution had not "built its case" on such evidence. Dunn, supra at 107. Accordingly, noted the Court, the offense had not been defined in terms of the appellate theory, and hence, the

presence of such unexplained evidence would not reinstate due process. Id.[19]

19/ The above statements of the Dunn court are not only the rule, but they are good policy. The Appeals Court implicitly adopts a rule that, where there is more than sufficient evidence of guilt before the jury, we can presume the jury to have discarded the erroneous theories of guilt offered by the prosecutor and judge. In short, this means that we can presume the jury to have divined the appellate theory from the facts. The problem with this view, however, is the serious risk involved that the jury did not so divine the appellate theory, and instead, that it convicted based on the erroneous or noncriminal theories before it.

So, because the sixth amendment requires that guilt be initially determined at the trial level, and because mere incidental or unexplained references by the prosecutor to the appellate theory do not assure that the conviction was so decided, the Supreme Court had decided that, under such circumstance, the better presumption is one of a conviction for noncriminal conduct. See Chiarella, supra, at 237

(footnote continued)

Because we find that prosecution in Cola's trial did not build its case on the evidence supporting the appellate theory, and, because we therefore find such evidence to have been left unexplained, the presence of such evidence is irrelevant to the due process violation here. Accordingly, we reject as immaterial any § 2254(d) presumption with respect to the Appeals Court's finding of ample evidence. Likewise, we reject as erroneous the apparent legal conclusion of the Appeals Court that the alleged ample evidence

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(footnote continued)

n.1. Likewise, we feel compelled to reject any presumption of juror ability to divine from the facts appellate theories unarticulated at trial. Rather, we regard it as incumbent upon the prosecution to present its case, and this in a manner consonant with subsequent appellate affirmances.

here could cure the failure of the prosecutor to relate such evidence to the appellate theory.

Based on our independent review of the record, we therefore conclude that the prosecutor's opening statement, his closing statement and the judge's charge to the jury, when compared to the appellate theory of guilt on the agency indictment, are simply not the same. Rather, the central theme of each principal stage, and indeed, the central theme of Cola's trial, was an agency conviction based on the loan transacions. Reference to the bankruptcy proceeding, while clearly present, was made in the context of the financial interest indictment. At best, a nexus between the agency indictment and the bankruptcy proceeding was

amorphously offered in passing, so that the jury would somehow divine, and independently articulate, the appellate theory. The evidence at trial corroborating the appellate theory was left, unfortunately, in a similar limbo. The Appeals Court, in our view, fundamentally misinterpreted the factual and legal significance of the proof and principal stages of trial. Thus, we reject the Commonwealth's contention that any presumption under § 2254(d) is not overridden.

4. Application of the harmless variance doctrine

The traditional variance analysis[20/] offered by the Commonwealth

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20/ This doctrine, known as the harmless variance rule and reflected in Fed. R. Crim. P. 52(a), originated in Berger v. United States, 295 U.S. 78

(footnote continued)

here involves three notable elements. First, the variance spoken of is a variance between the indictment and the proof at trial. Thus, because the foremost purposes of indictments are notice and protection from retrial

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(footnote continued)

(1935). Berger involved application of the "harmless error statute," § 269 of the Judicial Code as amended (28 U.S.C. § 391), to variances between the indictment and proof at trial. The harmless error statute provides as follows:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

for the same offense, courts have concluded that the presence of either element would render the variance "harmless" or not fatal. The second notable element of this harmless variance doctrine follows from the very possibility of harmlessness; in short, the presence of a variance between the indictment and the proof at trial does not constitute per se error. Third and finally, perhaps because variances between indictments and proof at trial are not regarded as per se error, the burden of proof as to error has been placed on defendants, who must not only show that the variance exists but also that the variance is "fatal." To establish such fatal error, defendants must establish either lack of notice and opportunity to defend, or lack

of double jeopardy protection. Accordingly, the ability to prove either element renders the variance fatal.

The Commonwealth's fourth argument for denying Cola's habeas petition thus involves the following claim: the Dunn decision, since it also mentions the indictment as narrowed by the bill of particulars, can be approached under the harmless variance doctrine, whereby a finding of either (i) adequate notice and an opportunity to defend or (ii) the ability to invoke double jeopardy protection upon retrial, would preclude due process challenges to an appellate theory of guilt not set forth at trial. In other words, the Commonwealth appears to be arguing that, even assuming the prosecution did not present the appellate theory of guilt to the jury

(and hence, that the appellate theory "varied" from the theory at trial), such a flaw would not be fatal due to indications of either (i) Cola's awareness of an adequate defense against the charge that he was being charged for wrongdoing at the bankruptcy proceeding, or (ii) the fact that Cola is protected, under the double jeopardy clause, from being retried for his actions in the bankruptcy proceeding.[21/]

21/ Presumably because the Commonwealth is aware of the strong due process language in Dunn and its progeny, it does not openly assert that the burden would be on Cola to establish the "variance" here to be fatal. Apparently, under the Commonwealth's view, the "presence" of either notice or double jeopardy protection, here established by the Commonwealth, would suffice to render the variance "harmless."

We begin by acknowledging a similarity between Dunn and the typical variance case. Each involves inquiry as to whether a certain formal statement or rationale of guilt -- respectively, the pretrial indictment as narrowed by the bill of particulars or the post-trial ground for appellate affirmance - corresponds to the actual events at trial, and hence, to the probable determinations of the jury. In each case, the policy of adequate notice is clear. Without specification in the indictment, we cannot be sure defendants have been aware of, and hence able to defend against, the government's charge at trial. And, without specification at trial of the appellate theory, we can neither be sure that defendants ever recognized, much less defended against, the final government rationale of guilt.

In our view, however, the latter situation raises more than notice problems. For it is not only unclear that defendants adequately defended, but it is further unclear that they were ever so tried. In short, cases such as Dunn raise sixth amendment problems of whether defendants have ever been presented with an opportunity to confront, in a fact-finding forum, the government's final theory of guilt. Further, it is not clear whether an opporutnity has been provided to have guilt determined by a jury in the first instance. Accordingly, given that variances between the appellate theory and the proof at trial raise not only fifth amendment notice problems but fundamental sixth amendment issues of confrontation and trial by jury, we have

strong reservations against unquestioning application of the harmless variance doctrine.

Our conclusion that the harmless variance doctrine may be here constitutionally inapposite is bolstered by the apparent rejection by the Supreme Court, in Dunn and Chiarella, of typical variance analysis in favor of a per se rule. In Dunn, the Court specifically noted that, because both the indictment and the proof at trial focused on noncriminal conduct, variance was not the problem. Thus, because the Dunn Court regarded the appellate de novo theory as offending "the most basic notions of due process," it reversed the Tenth Circuit and, by implication, rejected the Tenth Circuit's conclusion that the "variance" complained of in

Dunn could be approached under harmless variance analysis. See Dunn, supra at 105-107.

In Chiarella, likewise, the Court made no reference to traditional variance analysis. Rather, once the Court found a discrepancy between the appellate theory and the theory at trial, it concluded that affirmance would be impossible. Id. at 236-7. This, in our view, appears to be a per se rule.

Despite our inclinations to here declare a per se rule, we leave resolution of the issue for another day. Instead, we reject the Commonwealth's claim according to the same harmless variance analysis under which it is offered. In short, because we find (i) that proof of either lack of

notice or lack of double jeopardy protection renders a variance fatal, and (ii) that Cola had no notice of the appellate theory of guilty, we accordingly conclude the "variance" here not to be harmless, and hence, to require issuance of Cola's writ.

Prior decisions of this Circuit may generate uncertainty as to whether, in alleging a variance to be fatal, defendants must show lack of notice and lack of double jeopardy protection. U.S. v. George, 752 F.2d 749, 753-754 (1st Cir. 1985); U.S. v. Drougas, 748 F.2d 8, 17 (1st Cir. 1985); U.S. v. Flaherty, 668 F.2d 566, 582 (1st Cir. 1981). Given that each element -- notice and double jeopardy protection -- involves "substantial rights," we hereby clarify that defendants need only show

either element to be absent so as to render a variance fatal. U.S. v. Harrel, 737 F.2d 971, 981 (11th Cir. 1984); U.S. v. Kramer, 711 F.2d 789, 795 (7th Cir.), cert. denied, ___U.S.___, 104 S. Ct. 397 (1983); U.S. v. Heinmann, 705 F.2d 662, 669 (2nd Cir. 1983); U.S. v. Gonzalez, 661 F.2d 488, 492 (5th Cir. Unit B 1981); U.S. v. Francisco, 575 F.2d 815, 819 (10th Cir. 1978); U.S. v. Anderson, 532 F.2d 1218, 1227 (9th Cir. 1976), cert. denied, 429 U.S. 839 (1977); U.S. v. Cosby, 529 F.2d 143, 146 (8th Cir. 1976); U.S. v. Somers, 496 F.2d 723, 745 (3d Cir.), cert. denied, 419 U.S. 832 (1974).

As to whether Cola has here established a lack of notice and opportunity to defend, the Commonwealth makes two related assertions. First, it argues that Cola received actual notice of the appellate theory in the indictment and that, regardless of the proof at trial, such notice in the indictment satisfies Dunn. We have rejected both aspects of this contention above. Second, the Commonwealth argues that, even assuming a lack of notice in the indictment, notice as to the appellate theory can nonetheless be inferred from Cola's alleged adequate defense to such theory at trial. For the reasons stated below, we also reject this second claim.

An examination of the record reveals Cola's defense to have been largely, if

not wholly, directed to the prosecution theory that the loan transactions constituted the illegal acts of agency under the Massachusetts statute. With respect to the $30,000 loan transaction, Cola's defense amounted to repeated assertions that it was his wife, and not he, who orchestrated the loan. Moreover, Cola asserted that if he acted as anyone's agent, it was his wife, and not Rapp, who was the principal. Finally, as to the $10,000 transaction, Cola retorted that he acted on behalf of Volpe, not Rapp.

The only aspect of Cola's defense that approaches cognizance of the appellate theory was his claim, elicited both on direct and cross examination, that he did not represent the Commonwealth's interests on his lunch

hour. This lunch hour defense clearly addresses the appellate theory, and rebuts other evidence offered by the prosecution regarding Cola's representations to the judge at the bankruptcy proceeding.

The problem, however, with this defense is the same problem with the Commonwealth's assertions regarding ample evidence of guilty. In short, when Cola's lunch hour defense is compared to his voluminous and repeated other assertions, it becomes evident that his lunch hour statements were largely impromptu rebuttals that, in our view, hardly indicate meaningful notice of the appellate theory. Accordingly, because we regard these isolated statements of Cola's to be incidental to his defense, the Commonwealth's

assertion of notice to Cola and an adequate opportunity to defend is hereby rejected.

Given our conclusion that Cola has established lack of notice as to the appellate theory, we need not address whether Cola could establish the lack of double jeopardy protection against retrial for his actions at the bankruptcy proceeding. The lack of notice here, under harmless variance analysis, suffices to violate due process. Accordingly, although we note our inclination to declare a per se rule with respect to the "variance" involved in this case, we nonetheless conclude that, even applying harmless variance analysis, the Commonwealth's contentions of due process must be rejected.

For the reasons stated above, the

judgment of the district court below is reversed with instructions to forthwith issue a writ of habeas corpus to petitioner.

"Concurring follows"

ALDRICH, Senior Circuit Judge, concurring. With great respect to the court, whose opinion I do not fault, I wonder whether I might profitably say that I would be less generous to the Commonwealth. With the thought that not merely as a moral, but as a constitutional matter of due process it is the function of a bill of particulars to identify rather than conceal the claimed offense, I cannot read paragraph 2 of the bill[1/] as fairly adverting

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1/ 2. The defendant acted as an agent for Framingham Food Services, Inc. in granting a second mortgage to Utopia Realty Trust. The defendant acted as agent for Michael Rapp in obtaining a loan from one John Volpe. The defendant acted as agent for Framingham Food Services, Inc. in the payment of debts of the corporation, other than to the Commonwealth.

to two of the three matters, which I label A & B, that the Appeals Court cites as being criminal, although the evidence might well have supported them.

A. Cola's role as a secret agent for Rapp at the Bankruptcy Court proceedings was more malignant than the role of a disclosed agent because the Bankruptcy Court judge was not alerted to having to weigh Cola's recommendations in the light of Cola's role on behalf of Rapp. (468 N.E.2d 1102).

B. Cola participated in the scheme to extricate S & S from the control of the trustee in reorganization. (Id. at 1103).

I do not understand the Appeals Court's

rescuing the Commonwealth by finding evidence supporting these points; this is a criminal, not a civil proceeding where unobjected-to evidence may effect amendments.

Even if it were legally possible for a bill to be enlarged by the prosecutor's oral claims as to the issues, at least these should be sharply focused. If by a (too liberal, I think) interpretation it could be said that the prosecutor made point B in his closing argument, he clearly did not refer to A in either opening or summation. And I cannot find that the court, in its charge, referred to either.

The third factual ground on which the Appeals Court held a conviction could be sustained was with respect to certain actions apart from the bankruptcy trustee's removal --

allegedly dual agency acts impeding the Commonwealth's getting paid. It found such covered by the third portion of particular number 2. (n.1, ante). Even if that language could be taken to cover "filing returns . . . calculated to keep the tax collector at bay...and passing up opportunities to apply the loan proceeds to the reduction of tax arrearages," (468 N.E.2d at 1101), it would be very difficult so to read the only part of the charge that referred to defendant's dual agency conduct. The court charged,

> Now, here again we have got the state employee, and we have got the particular matter in which he as an employee is involved, and that is, no question about it, the collection and payment of taxes. The question is: Are you satisfied beyond a reasonable doubt that while involved

> in that he acted as an agent for anyone, which would be Rapp or the S and S, in connection with that matter?
>
> And you have heard the attorneys argue that indictment to you. It has to do with the loan, ... (Emphasis suppl.).

I believe any jury would be brought up sharp to take the last 18 words as describing what was meant by those proceding, viz., as referring to the loan, of which much had been made.[2/]

2/ Actually, I must wonder what the jury understood. The question addressed to the court during deliberations suggests total confusion.

"If, now that we have heard all the testimony and the charge to the jury, are we free to decide guilt or innocence on any basis whatsoever (except, of course, for being paid off for a vote)?"

The court's negative response did nothing to illuminate.

was not an offense, clearly instructed upon. Thus, the jury was either given one, bad, claim, or one bad and one or more good ones, and the verdict fails to show that it chose a good one. See Chiarella v. United States, 445 U.S. 222, 237 n.21 (1980). On either basis this was fundamentally unfair.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEIL R. COLA, Petitioner,	*	
V.	*	CIVIL ACTION NO. 85-225-S
CHARLES REARDON, Sheriff, Essex County, Respondent.	*	

MEMORANDUM AND ORDER ON
PETITION FOR WRIT OF HABEAS CORPUS

March 26, 1985

SKINNER, D.J.

On July 29, 1983, a jury in the Superior Court of the Commonwealth of Massachusetts convicted Neil R. Cola, an attorney in the Massachusetts Department of Revenue, on two indictments, the first charging violation of §6(a) of

Mass. Gen. Laws c. 268A, the state conflict of interest statute, and the second charging violation of §4(c) of the same statute. Section 4(c) prohibits a state employee from acting as an agent for someone other than the Commonwealth in a particular matter in which the Commonwealth has a direct and substantial interest. Section 6(a) prohibits a state employee from participating in a particular matter in which, to his knowledge, he, or his immediate family or privies have a financial interest.

The trial judge fined Cola $3,000 for the conviction under §6(a) and sentenced him to one year's imprisonment for the conviction under §4(c). The Massachusetts Appeals Court affirmed the

judgments, Commonwealth v. Cola, 18 Mass. App. Ct. 598, 468 N.E.2d 1094 (1984), and the Supreme Judicial Court denied his application for further appellate review. 393 Mass. 1104, 471 N.E.2d 1354 (1984). Cola, now in state custody, petitions for a writ of habeas corpus under 28 U.S.C. §2254 releasing him from the custody of the defendant.

In his petition, Cola attacks only his conviction under §4(c) on the ground that the Massachusetts Appeals Court deprived him of due process. Cola argues that the Appeals Court affirmed his conviction under §4(c) on a factual basis not specified in the indictment, bill of particulars, prosecutor's opening or summation as presented to the jury in the judge's charge. Denial of

Cola's petition for the Supreme Judicial Court exhausted his state remedies as to this due process claim.

The Massachusetts Appeals Court summarized the evidence in the light most favorable to the Commonwealth as follows:

> Cola, a lawyer in the compliance bureau of the Massachusetts Department of Revenue, first met Michael Rapp in 1976, when Rapp saw Cola in his official capacity about past due meals taxes owed to the Commonwealth by [the Sea and Surf] which Rapp owned. ...[From 1978 through 1981], the Sea and Surf was accruing indebtedness to the Commonwealth at a rate of approximately $6,000 to $9,000 per month on account of meals and withholding taxes. From December, 1979, to September, 1980, the period of the indictments, Cola was the tax official responsible for the collection of these taxes and Rapp, as he put it, "dealt with Mr. Cola strictly. I saw other people, but I dealt with Mr. Cola." On several occasions Cola filled out Rapp's meals tax returns and advised him how to

delay paying his taxes. When Cola sensed pressure from his office, he and Rapp would agree on a relatively small payment, often about $2,000 which served to defer more aggressive tax collection measures.

State taxes were not the only delinquency into which Sea and Surf fell. Framingham Food Services, Inc. (Food Services), which owned the real estate in which Sea and Surf operated (the restaurant operating company was Framingham S and S Corporation), fell behind in its real estate taxes. That circumstance precipitated a crisis in December, 1979. The town of Framingham said it would not renew Sea and Surf's alcoholic beverages license unless the taxes were brought current and threatened to remove the license at the stroke of midnight on December 31st, an act calculated to cast a pall over the New Year's revels of seven to eight hundred patrons expected by Rapp at the climatic hour.

To stave off such a calamity, Rapp plunged Sea and Surf into a reorganization under c. 11 of the Bankruptcy Code, 11 U.S.C. §1101 et seq. (1976). That maneuver produced the side effect, unpleasant for Rapp, of the

installation of a trustee to run the restaurant under the supervision of the Bankrupty Court. The trustee controlled the cash and was paying expenses such as taxes. Rapp viewed the trustee as "a hindrance on me operating."

Dissatisfied with his loss of control over the restaurant's cash flow, Rapp cast about for means to alter the situation. He spoke several times about his problem to Cola, who represented the interests of the Commonwealth in Sea and Surf's reorganization proceedings. What Rapp needed was $30,000 so that he might deposit that sum with the Bankruptcy Cout to cover the claims of unsecured creditors and be in a position to move to have the trustee discharged. Cola agreed to lend Framingham S and S Corporation (S & S) the required $30,000, the loan to be secured by a second mortgage on the real estate which Sea and Surf occupied.

On January 8, 1980, in a hallway outside of the Bankruptcy Court, Cola gave Rapp's lawyer a check for $30,000 in exchange for the mortgage, executed by Swift, from Food Services to Utopia. Rapp's lawyer presented the $30,000 check to the Bankruptcy Court and sought to have the trustee removed. A

representative of the United States Internal Revenue Service and the trustee in the c. 11 reorganization opposed the removal of the trustee. The trustee testified that Cola also was present, and that, in response to an inquiry by the Bankruptcy Court judge, Cola stated that the Commonwealth did not oppose the removal of the trustee and Rapp's corporation became a debtor in possession. Rapp repaid the $30,000 to Cola in June of 1980.

Later that year, in September, 1980, Rapp again needed cash. ...Rapp turned to Cola. The latter did not have $10,000 but offered to approach Volpe, whom Rapp had never met, for the money. Negotiations ensued, which culminated in Volpe's agreeing to lend Rapp the $10,000 in exchange for a $1,000 profit. On September 10, 1980, Cola and Volpe took the $10,000 in cash to the Sea and Surf...

During the period from December, 1979, through April, 1981 (on the latter date S & S moved to convert the c. 11 reorganization to a c. 7 bankruptcy and the restaurant was closed), Cola continued to tolerate payment of taxes by Rapp at a meager rate. Although Rapp

> estimated that he had made approximately twenty payments to Cola during this time span, the records of the Department of Revenue reflected only seven such payments by Rapp.

Commonwealth v. Cola, 18 Mass. App. Ct. at 600-603, 468 N.E.2d at 1097-1098 (footnotes omitted).

At trial, according to the state Appeals Court, "the presentation of the prosecution's case concentrated on Cola's exertions in obtaining loans on behalf of Rapp and the corporations he controlled as the illicit acts of agency". 18 Mass. App. Ct. at 608, 468 N.E.2d at 1101. The court held that this theory of guilty under §4(c) was "faulty" because procuring loans for Rapp's enterprised did not constitute a crime under §4(c). It was an activity

"unrelated to the particular matter, the collection of taxes, in which the Commonwealth had an interest". 18 Mass. App. Ct. at 609, 468 N.E.2d at 1102. The Appeals Court found other evidence, however, which it deemed sufficient to support Cola's conviction on the agency indictment:

> The evidence that Cola acted for Rapp and S & S (i.e., someone other than the Commonwealth) to minimize and delay the payment of State taxes (i.e., a particular matter in which the Commonwealth had a direct and substantial interest) satisfies the elements of the agency indictment. Cola accomplished tax minimization and delay of tax payments for Rapp by filing returns for him calculated to keep the tax collector at bay; by encouraging discharge of the trustee in the c. 11 reorganization, who was paying taxes; and by passing up opportunities to apply the loan proceeds to the reduction of tax arrearages.

Id. at 607, 608, 468 N.E.2d at 1101.

After stating this theory, however, the court admitted,

> At first blush, some difficulty arises because neither in the bill of particulars which the Commonwealth furnished, nor in the theory of its case as described in its opening and closing argument, did the Commonwealth emphasize those acts of Cola's which we have identified as proving most obviously the charge framed by the indictment.

Id. at 608, 468 N.E.2d at 1101.[1/]

The Appeals Court surmounted this problem by finding in the argument of

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1/ I note, incidentally, that the Commonwealth's brief on appeal to the state court characterized Cola's wrongdoing in connection with the bankruptcy proceeding as "arrang[ing] a loan to facilitate the removal of the trustee", Brief ap p. 16, which the appeals court called a faulty theory, and does not even mention Cola's "dual representation", id. at 611, 468 N.E.2d at 1103, the theory on which the state appeals court affirmed.

the trial prosecutor a passing reference to Cola's representation of the Rapp interest at the hearing before the bankruptcy court. All that he did at that time was not to oppose the removal of the Trustee. It is certainly arguable that removal of the Trustee was contrary to the interests of the Commonwealth. There was also ample evidence of other conduct by Cola which was violative of the terms of the statute. As the court said, divided loyalty is proscribed by the statute.

The difficulty is, however, that the case was not presented to the jury in a way which directed their attention to the conduct which the Appeals Court found violative of the statute. The references by the prosecutor were for

the most part in the context of Cola's help in obtaining loans for Rapp. The court's instructions, to the extent they were focused on the case at all, were directed to Cola's activity in obtaining loans for the benefit of Rapp and his corporations. The instructions were in fact so vague that the jury came back with the following question:

> If, now that we have heard all the testimony and the charge to the jury, are we free to decide guilt or innocence on any basis whatsoever (except, of course, for being paid off for a vote)?

The jury was instructed that they were to be governed by the law and the evidence. No timely objection was made to the instructions. The instructions must be considered, however, in determining whether the case which was

decided by the jury was the same case which was upheld by the Appeals Court. Dunn v. United States, 442 U.S. 100, 106 (1979).

This analysis starts with the indictment which alleged that Cola

> while being a state employee not in the proper discharge of his official duties did act as agent or attorney for someone other than the Commonwealth in connection with a particular matter in which the Commonwealth and a state agency is a party [sic] and has a direct and substantial interest.

Under Massachusetts law, specifications made in response to a motion for a bill of particulars limit the indictment and restrict the scope of the evidence to the matters stated in the bill, Commonwealth v. Alpert, 307 Mass. 239, 29 N.E.2d 817 (1940). The defendant moved for a bill of particulars. His second request was for

2. The acts of the Defendant which he performed as a state employee between December, 1979 and September, 1980 which were not in the proper discharge of his official duties.

The Commonwealth responded as follows:

2. The defendant acted as an agent for Framingham Food Services, Inc. in granting a second mortgage to Utopia Realty Trust. The defendant acted as agent for Michael Rapp in obtaining a loan from one John Volpe. The defendant acted as agent for Framingham Food Services, Inc. in the payment of debts of the corporation, other than to the Commonwealth.

This did not operate to limit the scope of the indictment because the request was not directed to the operative words of the charge. The defendant was not being charge with acts not in the proper discharge of his official duties, which are not necessarily crimes in any case. The words "while being a state employee

not in the proper discharge of his official duties" is a modifier of "did act as agent", and precludes a conviction for acting as an agent for another when to do so would be a proper discharge of the employee's duties; e.g., a child welfare worker acting on behalf of a client of the agency.

The defendant's fifth request was

> 5. The means by which the Commonwealth alleges the offenses were commited.

The Commonwealth responded:

> 5. The defendant's representation of the interests of Framingham Food Services, Inc. and one Michael Rapp.

As the Appeals Court correctly stated, there was ample evidence of violations of §4(c) which were within the scope of this specification. There was,

accordingly, no variance between the indictment as limited, the proof at trial, and the basis on which the Appeals Court upheld the conviction. Cf. Dunn v. United States, supra.

There remains to be considered the prosecutor's opening and closing and the judge's charge. The prosecutor's opening statement was short, comprising but 100 lines of transcript, and dealt with both charges. It is arguable at least that the last 15 lines encompassed the matters which the Appeals Court found supported the conviction. If there was any deficiency, it was waived, because the sufficiency of the opening statement was never challenged by a motion for a required finding of not guilty.

The closing argument was directed almost exclusively to Cola's assistance to Rapp in obtaining loans. The prosecutor is not required to cover all of the elements of the case, or indeed any of them. It does not appear, however, that under Massachusetts practice, or in trial practice generally, there are any requirements for a closing argument in a criminal case other than it be free of improperly prejudicial statements. As far as I can make out, the prosecutor could waive a closing or sing "Columbia, the Gem of the Ocean" without affecting the legal sufficiency of the case which is presented to the jury.

The part of the trial in which the case is finally framed for the jury is

the judge's charge. As stated, the charge did not focus on any action of the defendant except his services in securing loans for Rapp, which the Appeals Court declared to be no crime. The defendant did not take a timely objection as required by the Massachusetts rules, and his rights were lost. Commonwealth v. Cola, 468 N.E.2d at 1098-9. Since Cola did not comply with the state's contemporaneous objection rule, he cannot now complain in a petition for habeas corpus that the charge only focused on activity which was not a crime under §4(c). Wainwright v. Sykes, 433 U.S. 72 (1977); McLaughlin v. Gabriel, 726 F.2d 7, 9 (1st Cir. 1984). There has been no showing of cause for noncompliance with the state

rule which would exempt this case from the strictures of the cited cases.

The foregoing analysis may be summarized as follows:

1. The indictment as modified by the specifications encompasses conduct which the Appeals Court subsequently found to be criminal.
2. The opening statement alluded to such conduct sufficiently to survive a motion for a required finding of not guilty, which in any case was never made.
3. There was evidence which warranted a finding beyond a reasonable doubt that Cola had committed the criminal act charged in the indictment as limited by the specifications.

4. The closing statement did not fairly refer to any conduct subsequently found to be criminal, but that is of no legal consequence.

5. The charge to the jury refers only to conduct of the defendant which the Appeals Court found to be noncriminal, but because of the defendant's failure to comply with the state's contemporaneous objection rule, the deficiencies of the charge are not available as a basis for the issuance of a writ of habeas corpus. Wainwright v. Sykes, surpa.

The record is uninspiring: slipshod prosecution, somnolent defense and a trial judge left to wander through the resulting morass with little apparent help from counsel. Nevertheless, the indictment as limited described the crimes which were established by the evidence and upon the basis of which the Appeals Court sustained the convictions.

The key sentence in Dunn v. United States is the following:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic motions of due process.

422 U.S. at 106 [Emphasis supplied.]

In this case, the conviction was upheld on a charge that was alleged in the indictment and warranted by the evidence. That it was not also fairly

presented to the jury results from a deficient charge to the jury. The defendant's failure to comply with the contemporaneous objection rule precludes issuance of the writ on that ground. Wainwright v. Sykes, supra.

Accordingly, the complaint is DISMISSED.

UNITED STATES DISTRICT JUDGE

APPENDIX C

COMMONWEALTH V. NEIL R. COLA

Suffolk, May 21, 1984-September 28, 1984

Present: Armstrong, Kass, & Warner, JJ.

Conflict of Interest, Public Officer, Practice, Criminal, Instructions to jury, Indictment, Bill of particulars.

At the trial of indictments charging conflicts of interest in violation of G.L. c. 268A, §§4(c) and 6(a), the judge's charge to the jury, viewed as a whole, presented no substantial risk of a miscarriage of justice. [ ]

At the trial of an indictment under G.L. c. 268A, §6(a), evidence tending to prove that the defendant, while an employee of the Department of Revenue with responsibility for collecting meals taxes due the Commonwealth from a

certain restaurant corporation whose tax payments were seriously in arrears, accepted favors and gifts from the individual in control of the corporation, loaned $30,000 to the corporation at a time when it was in reorganization under the Bankruptcy Code, and aided in securing the discharge of the trustee in bankruptcy in order to restore the individual to control the restaurant, was sufficient to enable the jury to conclude that the defendant had a financial interest in a particular matter, the collection of taxes from the corporation, as to which he acted as a State employee. [ ]

ARMSTRONG, J., concurring.

At a criminal trial, evidence tending to prove that the defendant,

while an employee of the Department of Revenue with responsibility for collecting meals taxes due the Commonwealth, acted for an individual and a restaurant corporation controlled by him to minimize and delay the payment of State tax by the corporation was sufficient to enable the jury to conclude that the defendant had violated G.L. c. 268A, §4(c), by acting as an agent for an entity other than the Commonwealth in connection with a particular matter, the collection of taxes, in which the Commonwealth had a direct and substantial interest. [ ] ARMSTRONG, J., concurring.

The Commonwealth's bill of particulars with respect to an indictment under G.L. c. 268A, §4(c),

and its theory of the case as presented by the prosecutor in his opening statement were sufficient to specify that the defendant, while an employee of the Department of Revenue with responsibility for collecting meals taxes due the Commonwealth, had acted as agent for a certain restaurant corporation in connection with the payment of its debts, other than those owed to the Commonwealth. [ ]

ARMSTRONG, J., concurring.

INDICTMENTS found and returned in the Superior Court Department on December 7, 1982.

The cases were tried before Linscott, J.

Thomas D. Edwards (Stephen M. Perry with him) for the defendant.

Frances L. Robinson, Assistant Attorney General, for the Commonwealth.

KASS, J. Neil Cola was convicted by a jury on separate indictments charging two violations of G.L. c. 268A, the conflict of interest law.

One indictment founded on G.L. c. 268A, §4(c), as amended by St. 1978, c. 210, §§4 and 5, accused Cola of acting, while a State employee, as agent for someone other than the Commonwealth in connection with a particular matter in which the Commonwealth had a substantial interest. We shall refer to that as the "agency indictment."[1/]

1/ The indictment closely tracked the statutory language: "No state employee shall, otherwise than in the proper discharge of his official duties, act...as agent...for anyone in connection with any particular matter in which the commonwealth...has a direct

(footnote continued)

A second indictment, founded on G.L. c. 268A, §6(a), charged the defendant with participating, while a State employee, in a particular matter in which, to his knowledge, he and his immediate family had a financial interest. This is the "financial interest" indictment.[2/]

(footnote continued)

and substantial interest." G.L. c. 268A, §4(c).

2/ The first paragraph of G.L. c. 268A, §6(a), inserted by St. 1962, c. 779, §1, provides: "Except as permitted by this section, any state employee who participates as such employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both."

For the agency indictment conviction, a judge of the Superior Court sentenced Cola to one year's imprisonment in a House of Correction. As to the financial interest indictment, the defendant was fined $3,000. On appeal, Cola challenges the sufficiency of the government's evidence and claims error in denial of his motions for a required finding of not guilty as to each indictment. He also claims errors in the judge's instructions to the jury.

From the evidence at the close of the prosecution's case,[3/]

3/ The Commonwealth's case did not deteriorate during the presentation of the defendant's evidence, and, therefore, we need not consider separately the defendant's renewed motions for required findings of not guilty at the close of all the evidence. Commonwealth v. Kelley, 370 Mass. 147, 150 n.1 (1976). Commonwealth

(footnote continued)

the jury might have found the following:

Cola, a lawyer in the compliance bureau of the Massachusetts Department of Revenue, first met Michael Rapp in 1976, when Rapp saw Cola in his official capacity about past due meals taxes owed to the Commonwealth by one of several restaurants which Rapp owned.[4/] Cola and his wife, Marian, became friendly with Rapp and his close friend, Janet Swift. From 1978 through 1981, about three to four times a week, Rapp treated Cola to dinner or drinks at another restaurant he had come to own,

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(footnote continued)

v. Dutney, 4 Mass. App. Ct. 363, 369 n.6 (1976).

4/ We use the verb "owned" in a broad sense, i.e., that Rapp had a controlling interest in whatever business entity had been organized to operate each restaurant and had full managerial responsibility for that restaurant.

the Sea and Surf, in Framingham. During this period the Sea and Surf was accruing indebtedness to the Commonwealth at a rate of approximately $6,000 to $9,000 per month on account of meals and withholding taxes.[5/] From December, 1979, to September, 1980, the period of the indictments, Cola was the tax official responsible for the collection of these taxes and Rapp, as he put it, "dealt with Mr. Cola strictly. I saw other people, but I dealt with Mr. Cola." On several occasions Cola filled out Rapp's meals tax returns and advised him how to delay

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5/ By the end of 1979, a significant date in the case, the then liability had grown to $125,557.10. By October 15, 1982, the last date upon which the Commonwealth computed the Sea and Surf's tax liability, the arrearage had grown to $336,120.86.

paying his taxes. When Cola sensed pressure from his office, he an dRapp would agree on a relatively small payment, often about $2,000, which served to defer more aggressive tax collection measures.

State taxes were not the only delinquency into which Sea and Surf fell. Framingham Food Services, Inc. (Food Services), which owned the real estate in which Sea and Surf operated (the restaurant operating company was Framingham S and S Corporation),[6/] fell behind in its real estate taxes.

6/ Rapp testified that as he was on the brink of exceeding the borrowing limits for Small Business Administration loans, it became expedient to resign his offices in the Sea and Surf corporations and to install his friend Janet Swift in his place. "Janet was actually a front for me," Rapp explained "I ran the business on a day-to-day operation."

That circumstances precipitated a crisis in December, 1979. The town of Framingham said it would not renew Sea and Surf's alcoholic beverages license unless the taxes were brought current and threatened to remove the license at the stroke of midnight on December 31st, an act calculated to cast a pall over the New Year's revels of seven to eight hundred patrons expected by Rapp at the climactic hour.

To stave off such a calamity, Rapp plunged Sea and Surf into a reorganization under c. 11 of the Bankruptcy Code, 11 U.S.C. §1101 et seq. (1976). The maneuver produced the side effect, unpleasant for Rapp, of the installation of a trustee to run the restaurant under the supervision of the

Bankruptcy Court. The trustee controlled the cash and was paying expenses such as taxes. Rapp viewed the trustee as "a hindrance on me operating."

Dissatisfied with his loss of control over the restaurant's cash flow, Rapp cast about for means to alter the situation. He spoke several times about his problem to Cola, who represented the interests of the Commonwealth in Sea and Surf's reorganization proceedings. What Rapp needed was $30,000 so that he might deposit that sum with the Bankruptcy Court to cover the claims of unsecured creditors and be in a position to move to have the trustee discharged. Cola agreed to lend Framingham S and S Corporation (S & S) the required $30,000, the loan to be secured by a

second mortgage on the real estate which Sea and Surf occupied.[7/]

Apparently Cola thought it prudent not to receive the mortgage directly. He asked one Volpe, a fellow employee at the Department of Revenue, if a trust of which Volpe was trustee, the Utopia Realty Trust, would hold the mortgage. When Volpe inquired about the identity of the corporation giving the mortgage, Cola told him the principal was Michael Rapp.

On January 8, 1980, in a hallway outside of the Bankruptcy Court, Cola gave Rapp's lawyer a check of $30,000 in exchange for the mortgage, executed by Swift, from Food Services to Utopia.

7/ The mortgage, thus, would run from Food Services.

Rapp's lawyer presented the $30,000 check to the Bankruptcy Court and sought to have the trustee removed. A representative of the United States Internal Revenue Service and the trustee in the c. 11 reorganization opposed the removal of the trustee. The trustee testified that Cola also was present, and that, in response to an inquiry by the Bankruptcy Court judge, Cola stated that the Commonwealth did not oppose the removal of the trustee. The court granted Rapp's motion to remove the trustee and Rapp's corporation became a debtor in possession. Rapp repaid the $30,000 to Cola in June of 1980.

Later that year, in September, 1980, Rapp again needed cash. He arranged to receive a check for $20,000 from one

Garabedian in exchange for $10,000 and some stock. The ill-conceived idea was that should Rapp fail to pay Garabedian back the remaining $10,000, Garabedian could claim a loss on the stock for which he had purportedly paid $20,000, and come out even. For the $10,000 which he transiently required, Rapp turned to Cola. The latter did not have $10,000 but offered to approach Volpe, whom Rapp had never met, for the money. Negotiations ensued, which culminated in Volpe's agreeing to lend Rapp the $10,000 in exchange for a $1,000 profit. On September 10, 1980, Cola and Volpe took the $10,000 in cash to the Sea and Surf, where they exchanged it with Rapp for a $20,000 check made out to Cola. Volpe accompanied Cola to a

bank, where the latter cashed the check and gave Volpe a check for $11,000. Rapp agreed that a check for $2,000 should be drawn to the Commonwealth on account of taxes in response to pressure upon Cola from his department. In addition, Cola caused a bank check for $3,500 to be written to Boston Edison, to which Rapp also owed money. Cola delivered the cash balance to Rapp at the Sea and Surf.

During the period from December, 1979, through April, 1981 (on the latter date S & S moved to convert the c. 11 reorganization to a c. 7 bankruptcy and the restaurant was closed), Cola continued to tolerate payment of taxes by Rapp at a meager rate. Although Rapp estimated that he had made approximately

twenty payments to Cola during this timespan, the records of the Department of Revenue reflected only seven such payments by Rapp.

We turn to the errors of law raised on appeal in inverse order of difficulty.

1. THE JURY INSTRUCTIONS. Although Cola's appellate counsel condemns the trial judge's jury instructions as suffused with "pervasive" and "fundamental" error, the flaws were not as obvious at the conclusion of the charge as when appellate counsel performed their autopsy. When invited to comment on the charge, the only subject trial counsel pressed was an amplified instruction to the effect that the burden was on the government to establish that Cola and Rapp in dealing

with Sea and Surf had torn the corporate veils shielding S & S, Food Services, and Rapp from one another. Indeed, the judge asked defense counsel, "If I give them 11 [the number of the requested instruction], does that make you happy?" He then gave the desired additional instruction.

As matters developed, it was not the last opportunity counsel had to consider the charge. Two hours after the jury had retired to deliberate, the jury sent to the judge the following remarkable question: "If, now that we have heard all the testimony and the charge to the jury, are we free to decide guilt or innocence on any basis whatsoever (except, of course, for being paid off for a vote)?" The judge told the jurors

they were confined to finding facts on the basis of what had developed before them in the courtroom and to apply the law to the facts they found. Counsel were invited to offer additions and suggested none.

In the circumstances there is no occasion for us to consider the claimed errors in the jury instructions. Mass. R. Crim. P. 24(b), 378 Mass. 895 (1979), provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection." Commonwealth v. Pope, 15 Mass. App. Ct. 505, 511-512 (1983). As to the charge, the residual question,

therefore, is whether, viewed as a whole, it created a substantial risk of a miscarriage of justice. Commonwealth v. Freeman, 352 Mass. 556, 564 (1967). Commonwealth v. Howell, 386 Mass. 738, 739 (1982). We perceive no such risk. The judge paraphrased the pertinent statutes which defined the crime with reasonable accuracy. Nuances and definitions of terminology could unquestionably have been improved upon; the distinction between the agency indictment and the financial interest indictment could have been illuminated with greater clarity. Taken with the Commonwealth's powerful evidence, however, it seems unlikely the jury were misled by defects in the charge. See Commonwealth v. Canon, 373 Mass. 494, 498 (1977).

After the jury returned its verdicts, the defense moved to set aside the verdicts and for a new trial, for reasons which included errors in the jury instructions. The judge denied the motion without comment and the issues as to the jury instructions were not resurrected for appeal by the new trial motion. Compare Commonwealth v. Buckley, 17 Mass. App. Ct. 373, 374 (1984).

2. THE FINANCIAL INTEREST INDICTMENT. In response to the defendant's motion for a bill of particulars on the financial interest indictment (under G.L. c. 268A, §6[a]), the Commonwealth identified the prticular matter in which Cola participated as "[t]he collection of

taxes due the Commonwealth of Massachusetts by Framingham S & S Corp." As to the nature of Cola's participation, the particulars specified that "[t]he defendant represented the Commonwealth's interests in the collection of taxes due the Commonwealth. . ." The particulars described Cola's financial interest as "[a] business transaction in the amount of [$30,000]. . ."

It will be recalled that the taxes due the Commonwealth were those of S & S, and Cola's $30,000 loan was secured by a mortgage on real estate owned by Food Services. For that reason, as we follow the argument, the defense contends on appeal that the Commonwealth failed to prove Cola or his family had

any interest in S & S and no interest in the collection of taxes from that corporation. Moreover, the defense argues, it was not legally possible for Cola to acquire a financial interest in S & S at the time asserted by the Commonwealth because that corporation was in c. 11 proceedings and lacking authority to incur debt without leave of the Bankruptcy Court.

What the argument ignores is the identity of interest between S & S, Food Services, and Rapp, of which there was ample evidence, including that the $30,000 check procured by Cola was made payable to "Richard Cohen, Attorney for Framingham S & S Corp." "Facts not intrequently exist which warrant or require that courts look through

corporate forms to the dominating personality behind them in order to prevent fraud, to protect the public, or to accomplish some essential justice." New England Theatres, Inc. v. Olympia Theatres, Inc., 287 Mass. 485, 493, cert. denied sub nom. E.M. Loew's, Inc. v. New England Theatres, Inc., 294 U.S. 713 (1934); My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 618-619 (1968). Compare Westcott Constr. Corp. v. Cumberland Constr. Corp., 3 Mass. App. Ct. 294, 297-299 (1975). The answer to the alleged effect of the inhibition in the Bankruptcy Code is that the money in fact did travel to S & S.

The term "financial interest" as used in §6(a) may not encompass every

creditor relationship. Some may be of a minor, indirect, or diffuse nature which does not give rise to concern proportionate to the significant penalties provided in the conflict of interest statute. See Braucher, Conflict of Interest in Massachusetts, in Perspectives of Law: Essays for Austin Wakeman Scott 3 (Pound, Griswold & Sutherland), at 28 (1964). We leave to another day when, and if, that might be the case.

For purposes of the case before us, several factors combine to produce a "financial interest" on Cola's part within the meaning of the statute. First, the $30,000 loaned by Cola (the source of the money was a savings account owned by Cola's wife) was not an

insignificant amount, and certainly significant it terms of the assets at Cola's command.[8/] Second, the $30,000 loan was to a business teetering on the edge of a fiscal abyss and Cola, as the maker of the loan, acquired an immediate concern with the cash flow of the Sea and Surf enterprise. Collection of taxes, the precise particular matter for which Cola had responsibility as a State employee in regard to Sea and Surf, would be to Cola, as creditor, an undesirable diversion of funds otherwise available to repay him. What happened at the Bankruptcy Court proceedings illustrates the conflict of interest. As a State employee, Cola ought to have

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8/ It will be recalled that when Rapp needed an additional $10,000 some time later, Cola did not have the money.

been in a position to choose a course which would maximize tax collections. If this involved leaving the trustee in reorganization in charge (a course which a representative of the United States Internal Revenue Service preferred), or even closing the restaurant down, so be it. Cola, as creditor, however, would prefer that the business continue to operate and with Rapp at the helm. Indeed, as Cola had gone to some pains to disguise the source of the $30,000 loan, he would be apprehensive about having a stranger running the business. A third factor which enhances Cola's financial interest in Sea and Surf is the web of relationships he established with Rapp. These included the frequent

(i.e., several times a week) dinners and drinks on the house at Sea and Surf, permitting Rapp to give him a set of furniture, and assisting with the arrangement of a further infusion of funds (the convoluted $10,000 loan previously described). We are satisfied that by reason of the factors we have enumerated Cola had a financial interest in the statutory sense in a particular matter, the collection of taxes from the Sea and Surf enterprise, as to which he acted as a State employee. Compare Graham v. McGrail, 370 Mass. 133, 138 (1976) (construing G.L. c. 268A, §19(a), a parallel provision governing municipal employees); Sciuto v. Lawrence, 389 Mass. 939, 947-948 (1983)(also construing §19[a]); Craven v. State

Ethics Commn., 390 Mass. 191, 201-202 (1983); Braucher, Conflict of Interest in Massachusetts, in Perspectives of Law: Essays for Austin Wakeman Scott 3, 26-27; Buss The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U.L. Rev. 299, 355-356 (1965). Cola did not avail himself of the safe harbor provisions which appear in the second paragraph of G.L. c. 268A, §6(a). Those provide for a disclosure of the particular matter and financial interest by a State employee to the official responsible for the appointment to the employee's position and to the State Ethics Commission. Upon disclosure, §6(a) authorizes a written determination by the appointint official that the interest is not so substantial as to be

deemed likely to affect the integrity of the services which the Commonwealth may expect from the employee.[9/] Instead Cola used intermediaries and bank checks to mask his connection with the business of Sea and Surf.

9/ The State Ethics Commission plays no further role; it simply receives a copy of the appointing official's determination.

3. THE AGENCY INDICTMENT. There was evidence sufficient to convict Cola on the agency indictment as first framed. That indictment, hewing pretty well to G.L. c. 268A, §4(c), charged that Cola, while a State employee, had acted as an agent for someone other than the Commonwealth in connection with a particular matter in which the Commonwealth had a direct and substantial interest. The evidence that Cola acted for Rapp and S & S (i.e., sommeone other than the Commonwealth) to minimize and delay the payment of State taxes (i.e., a particular matter in which the Commonwealth had a direct and substantial interest) satisfies the

elements of the agency indictment.[10/] Cola accomplished tax minimization and delay of tax payments for Rapp by filing returns for him calculated to keep that tax collector at bay; by encouraging discharge of the trustee in the c. 11 reorganization, who was paying taxes; and by passing up opportunities to apply the loan proceeds to the reduction of tax arrearages.

At first blush, some difficulty arises because neither in the bill of

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10/ We understand that revenue agencts may -- and do -- compromise the liability of tax delinquents and arrange for the payment of arrearages on a scheduled basis. Such compromises, however, presuppose a disinterested tax collector who acts in the long term interest of the Commonwealth, untainted by a financial stake of his own in the taxpayer.

particulars which the Commonwealth furnished, nor in the theory of its case as described in its opening and closing argument, did the Commonweath emphasize those acts of Cola's which we have identified as proving most obviously the charge framed by the indictment. Rather, the particulars supplied by the Commonwealth on the agency indictment and the presentation of the prosecution's case concentrated on Cola's exertions in obtaining loans on behalf of Rapp and the corporations he controlled as the illicit acts of agency. The Commonwealth's bill of particulars specified the forbidden acts under the agency indictment as follows: "The defendant acted as a agent for

Framingham Food Services, Inc. in granting a second mortgage to Utopia Realty Trust. The defendant acted as agent for Michael Rapp in obtaining a loan from one John Volpe. The defendant acted as agent for Framingham Food Services, Inc. in the payment of debts of the corporation, other than to the Commonwealth."11/

Obtaining loans for a taxpayer from sources other than the Commonwealth, if the loans are unrelated to any interest of the Commonwealth, does not transgress §4(c). The vice which §4(c) proscribes

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11/ Food Services, which was the real estate holding vehicle, did not owe taxes to the Commonwealth. The taxes to the State were owed by S & S. In view of the way Rapp mingled the affairs and assets of these corporations, we make nothing of the confusion in the bill of particulars.

is an act of agency (i.e., representation) by a State employee for a private party in connection with any particular matter in which the Commonwealth has a direct or substantial interest. This pertains not only to the business of the office in which the State employee is employed, but any State business. Cola would have violated §4(c), for example, had he, an employee of the Department of Revenue, spoken on Rapp's behalf before the State Department of Public Health about a public health matter. See Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U.L. Rev. at 322-323. See generally, Massachusetts State Ethics Commission, Guide to the

Conflict of Interest Law 7-12 (Rev. 1983). A major purpose of §4(c), although not, as we shall see, the only one, is to prevent influence peddling by State employees on behalf of persons who have business with the Commonwealth.

Section 4(c), as opposed, in some circumstances, to other provisions of G.L. c. 268A, e.g., §§6 and 23, does not interdict a State employee from acting as an agent in connection with a matter unrelated to State business. To illustrate, Cola Could act in Rapp's behalf in recruiting and hiring a new chef and not violate §4(c).

The defense says that the agency indictment, as specified in the particulars and as tried by the

prosecution, describes activity which does not violate §4(c); that is, that Cola's activity in procuring loans for S & S was unrelated to the particular matter, the collection of taxes, in which the Commonwealth had an interest. See G.L. c. 268A, §1(k),[12/] as amended by St. 1982, c. 612, §1. Specifications in a bill of particulars "set forth in method and means by which the Commonwealth intended to prove [how] the offense charged in the indictment was committed, and restricted the scope of the indictment and the manner of

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12/ "Particular matter" is defined in §1(k), as including any "claim, controversy. . .decision, determination, finding. . ." It would include matters invoking taxation. See Report of the Special Commission of Code of Ethics, 1962 House Doc. No. 3650, at 12.

proof to the grounds alleged in the specifications. The indictment is to be read with the specifications." Commonwealth v. Albert, 307 Mass. 239, 243 (1940). Commonwealth v. Leavitt, 17 Mass. App. Ct. 585, 595 (1984). Compare Commonwealth v. Ianello, 344 Mass. 723, 726 (1962); Commonwealth v. Hare, 361 Mass. 263, 266-269 (1972).

Upon examination, however, the Commonwealth's bill of particulars discloses that the prosecution did not limit itself to the single theory that acting for the Rapp enterprise to procure loans violated §4(c). That, as we have said, is a faulty theory. The particulars also specified that the defendant acted as an agent for a

corporation controlled by Rapp in connection with the payment of debts of the corporation, other than to the Commonwealth. The particulars further stated that the particular matter in which the Commonwealth had a direct and substantial interest was the collection and payment of taxes. The defense also argues that the Commonwealth on appeal developed a new theory of the agency aspect of the case, viz., that Cola acted for Rapp in the course of the Bankruptcy Court proceedings involving Sea and Surf. In outlining the theory of the government's case in his opening, however, the prosecutor said the evidence would show Cola was not collecting delinquent taxes, that Cola

represented the interests of the Commonwealth in the Bankruptcy Court proceedings at the same time that he procured funds for Rapp's corporation and produced them at the Bankruptcy Court in a context disadvantageous to the Commonwealth's tax collection efforts, and that through his actions the Rapp interests received favorable treatment in the tax collection proceedings. When he summarized the evidence in his closing, the prosecutor argued expressly that the evidence had demonstrated that Cola had represented "the interests of S & S and Michael Rapp" at the Bankruptcy Court on a date when it was his obligation "to represent the interests of the [S]tate" and that,

more generally, the evidence had shown "that while Mr. Cola was a representative of the Commonwealth, a [S]tate employee, he acted on behalf of Michael Rapp. . . [Paraphrasing the statute], he acted as an agent for someone other than the Commonwealth in a particular matter in which the Commonwealth has an interest."

Divided loyalty, as well as influence peddling, is a target of the "other agency" proscription which appears in §4(c). Cf. Commonwealth v. Canon, 373 Mass. at 504 (Liacos, J., dissenting); Edgartown v. State Ethics Commn., 391 Mass. 83, 89 (1984) (construing G.L. c. 268A, §17. Buss, The Massachusetts Conflict of Interest

Statute: An Analysis, 45 B.U.L. Rev. at 323. See also Massachusetts State Ethics Commn., Guide to the Conflict of Interest Law 7 (1983). A statute which disapproves known double agency surely condemns covert dual representation. Cola's role as a secret agent for Rapp at the Bankruptcy Court proceedings was more malignant than the role of a disclosed agent because the Bankruptcy Court judge was not alerted to having to weigh Cola's recommendations in the light of Cola's role on behalf of Rapp. To so construe §4(c) does not, in the view of a majority of this panel, subject State employees to risk of conflict of interest prosecution in circumstances where they compromise the

Commmonwealth's position or appear to show favoritism. Exercise of that sort of discretion, as we observed in another context in not 10, supra, is part of the process of public administration. Chapter 268A, §4(c), comes into play when, as in this case, there is a palpable link between the private person doing business with the government and the government employee, whereby the latter is bound -- or appears to be bound -- to speak and act on behalf of the former.

The Commonwealth, in its particulars and in the presentation of its evidence, touched sufficiently on facts from which a rational trier of fact could find beyond a reasonable doubt that a

violation of §4(c) had been proved. At trial, the Commonwealth adduced evidence of dual representation by Cola at the Bankruptcy Court proceedings, i.e., that Cola participated in the scheme to extricate S & S from the control of the trustee in reorganization while simultaneously appearing in Bankruptcy Court to represent the Commonwealth's interest. That dual representation worked to the Commonwealth's disadvantage in that the trustee in reorganization had more diligently paid State taxes than Rapp had, or was likely to do. Once again, therefore, the record does not bear out Cola's complaint that the prosecution's theory under the agency indictment was first

culled from the record during the appellate proceedings. Cf. Commonwealth v. Canon, 373 Mass. at 496-498.

Accordingly, the motions for required findings of not guilty were correctly denied.

Judgments affirmed.

ARMSTRONG, J. (concurring). I join in part one of the opinion and concur in the result. In my view both statutes (G.L. c. 268A, §6[a] and §4[c]) were violated when Cola, representing the Commonwealth in the bankruptcy proceeding (the particular matter), became financially interested in the proceeding himself by his loan to Rapp (through one of Rapp's corporations) and represented Rapp (as well as himself) in arranging the mortgage to Utopia Realty Trust. Both sets of particulars are vague in specifying the particular matter as the collection of taxes due the Commonwealth; but, because the Commmonwealth's interest in the bankruptcy proceeding was the collection

of taxes, the particulars are only open to criticism for overbreadth. They do not foreclose proof of the indictments in the manner indicated. The particulars on the financial interest indictment to identify the $30,000 loan as Cola's financial interest; and those on the agency indictment identify Cola's representation of Rapp's corporation in arranging the mortgage transaction with Utopia Realty Trust as one of the agency relationships violative of the statute. Consequently the defendant was on notice that the Commonwealth would attempt to prove the defendant's liability under both indictments through his actions in the course of the bankruptcy proceedings, in arranging the financing

to extricate Rapp from control of the Bankruptcy Court. With respect to those proceedings Cola was acting, in various capacities, for the Commonwealth, for Rapp, and for himself -- the very multiplicity of roles with respect to particular matters that the conflict of interest law was meant to avoid. More than this it is not necessary to say, other than to observe that, as Cola permitted himself to become personally, financially involved in the particular matter in which he was acting for the Commonwealth, this case does not present the more far-reaching question whether a creditor-debtor relationship between a Commonwealth employee (or member of his family) and one who comes before him, in

his official capacity, on any matter with financial implications, by itself presents a conflict of interest situation under §6(a). In addition, I would record my reluctance to interpret §4(c), the agency section, to cover a Commonwealth employee who is alleged not to have pressed the Commonwealth's claim vigorously enough, thus opening himself to the suspicion that he "took a dive" or showed favoritism. If the reason for the employee's action is that he is receiving compensation therefor, his behavior is made punishable by §4(a). If the reason is that the employee or a member of his family has a personal financial interest, his behavior is made punishable by §6(a). To say that the

employee acted as "agent" for the person whom he favored would, in those cases, involve duplication of coverage so extensive as to make §§4(a) and 6(a) superfluous; and in other cases of favoritism (such as political favoritism or favoritism to religious, educational, or charitable organizations or to unions or other special interest groups) would make punishable conduct not generally thought subject to the Conflict of Interest Law (except, in some instances, through §23); and liability could be made to turn, unsoundly, upon inquisition into motives. General principles of narrow construction of criminal statutes require, in my view, giving the word "agent" something like

its normal unmodified (by, e.g., "secret", or "double", or "undisclosed") meaning, which, to me, connotes open representation of another's interests by authority from him. That concept seems to have been in the mind of the draftsman. See Final Report of the Special Commission Established to Make an Investigation of an Act Establishing a Code of Ethics to Guide Employees and Officials of the Commonwealth in the Performance of Their Duties, H. 3650 of 1962, at 12. See also Buss, cited in the majority opinion, at 327. The latter reads §4(c) as applying to private action by a State employee, rather than his official actions, and reads the core concept to be directed

against influence peddling. Id. at 323.

APPENDIX D

Further appellate review denied:

Commonwealth v. Neil R. Cola.

Reported below: 18 Mass. App. Ct. 598 (1984). Mme. Justice Abrams did not participate.

APPENDIX E

MASSACHUSETTS STATUTES AND RULES OF COURT

M.G.L. c. 268A § 6

§6. Financial interest of state employee, relative or associates; disclosure

(a) Except as permitted by this section, any state employee who participates as such employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom his is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

It shall not be a violation of this section (1) if the employee first advises the state official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, or (2) if, by general rule or regulation approved by the attorney general, the financial

interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of state employees' services.

Added by St.1962, c. 779, § 1

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

RULE 24. OPENING STATEMENTS; ARGUMENTS; INSTRUCTIONS TO JURY

(Applicable to Superior Court and jury sessions in District Court)

(a) Opening and Closing Statements; Arguments.

(1) Order of Presentation. The Commonwealth shall present its opening statement first. The defendant may present an opening statement of his defense after the opening statement of the Commonwealth or after the close of the Commonwealth's evidence. The defendant shall present his closing argument firts.

(2) Time Limitation. Counsel for each party shall be allowed fifteen minutes for an opening statement and thirty minutes for argument; but before the opening or the argument commences, the judge on motion or sua sponte, may reasonably reduce or extend the time.

(b) Instructions to Jury; Objection. At the close of the evidence or at such earlier time during thetrial as the judge reasonably directs, any party may file written requests that the judge instruct the jury on the law as set forth in the requests. The judge shall inform counsel of his proposed action upon requests prior to their arugments to the jury. No party may assign as error the giving or the failure to give

an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection. Upon request, reasonable time shall be given to each party to object to the charge before the jury retires. Where either party wishes to object to the charge or to request additional instructions, the objection or the request shall be made out of the hearing of the jury, or where appropriate, out of the presence of the jury.

M.G.L. c. 268A § 4

§4 Other compensation; offer, gift, receipt or request; acting as agent or attorney of other than state; legislators; special state employees

(a) No state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

(b) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(c) No state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency,s or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than three thousand dollars

or by imprisonment for not more than two years, or both.

A member of the general court shall not be subject to paragraphs (a) or (c). However, no member of the general court shall personally appear for any compensation other than his legislative salary before any state agency, unless:

(1) the particular matter before the state agency is ministerial in nature; or

(2) the appearance is before a court of the commonwealth; or

(3) the appearance is in a quasi-judicial proceeding.

For the purposes of this paragraph, ministerial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents. For the purposes of this paragraph, a proceeding shall be considered quasi-judicial if:

(1) the action of the state agency is adjudicatory in nature; and

(2) the action of the state agency in appealable to the courts; and

(3) both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding.

A special state employee shall be

subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

This section shall not prevent a state employee from taking uncompensated action, not inconsistent with the faithful performance of his duties, to aid or assist any person who is the subject of disciplinary or other personnel administration proceedings with respect to those proceedings.

This section shall not prevent a state employee, including a special employee, from acting, with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom his is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the state official responsible for appointment to his position approves.

This section shall not prevent a present or former special state employee from aiding or assisting another person for compensation in the performance of

work under a contract with or for the benefit of the commonwealth; provided, that the head of the special state employee's department or agency has certified in writing that the interest of the commonwealth requires such aid or assistance and the certification has been filed with the state ethics commission.

This section shall not prevent a state employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

This section shall not prevent a state employee, other than an employee in the department of revenue, from requesting or receiving compensation from anyone other than the commonwealth in relation to the filing or amending of state tax returns.

Amended by St.1978, c. 210 §§4,5; St.1980, c. 10, §1; St.1982 c. 143.

Supreme Court, U.S.
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OCT 10 1986
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CLERK

NO. 85-2019

IN THE SUPREME COURT
OF THE UNITED STATES

CHARLES REARDON,
Petitioner,

v.

NEIL COLA,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT, NEIL R. COLA, IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the First Circuit correctly rule that it violates due process to send a defendant to prison for an offense he was neither accused of nor tried for?

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STATEMENT OF THE CASE

The respondent, Neil R. Cola ("Cola") was charged in state court under two indictments accusing him of violations of the Massachusetts conflict of interest laws. The indictment that is relevant here alleged that Cola, while a state employee, acted as an agent or attorney for someone other than the Commonwealth of Massachusetts in connection with a particular matter in which the Commonwealth was a party or had a direct and substantial interest.

Cola requested and was furnished a bill of particulars which, under state law, strictly limited the generalized one-sentence indictment. The case was tried and submitted to the jury on theories set forth in the bill of particulars. The jury returned a verdict of guilty, and Cola was sentenced to a year in jail.

On appeal the Massachusetts Appeals Court held that the acts Cola was charged with and sentenced to jail for were not criminal conduct. (Pet. App. C) Incredibly, the court affirmed the conviction anyway, finding that Cola was guilty of a different crime with which he was not charged, and which was never submitted to the jury or considered at all in the trial court.

Cola filed a petition for habeas corpus alleging that his conviction on appeal of a crime he was neither charged with nor tried for was a fundamental denial of due process. The district court agreed that the crime Cola was convicted of on appeal had not been submitted to the jury, but the court refused to issue the writ of habeas corpus. (Pet. App. B) Cola's application for bail was denied, and he served out his entire sentence.

The United States Court of Appeals for the First Circuit unanimously reversed on two grounds. (787 F.2d 681; Pet. App. A) Following controlling decisions of this Court, the First Circuit held first, that Cola's rights to due process were violated when he was imprisoned for a crime that was never submitted to or considered by the jury. (787 F.2d at 693-95; Pet. App. A at 53-65). Second, the court held that Cola's rights were violated by his imprisonment for a crime he had not been accused of. (787 F.2d at 695-96; Pet. App. A at 68-71).

Unfortunately, these rulings came after Cola had completed his sentence.

ARGUMENT

The petition presents no substantial question warranting review by this Court. The decision of the Court of Appeals -- which rested on two independent grounds -- was a proper application of well-settled principles of due process. Indeed, the

petition for a writ of certiori is so frivolous as to warrant an award of damages under S.Ct. Rule 49 to Cola, who, having completed his sentence for a crime he was neither charged with nor tried for, has now been put to the unnecessary expense of having to respond to the meritless petition.

Petitioner does not even argue error as to the First Circuit's holding that Cola was unconstitutionally convicted on appeal of a crime he was not charged with. (787 F.2d at 695-96; Pet App. A at 68-71). The correctness of the result below is therefore a foregone conclusion.

Petitioner disputes only the court's alternative holding that Cola's rights to due process were violated when he was convicted on appeal of a crime never submitted to the jury. There is nothing new or even controversial about this holding. This has been settled law since Cole v. State of Arkansas, 333 U.S. 196 (1948).

A. The First Circuit Properly Looked to the Trial Court's Instructions to Determine What Crime Cola Had Been Convicted Of

It has long been settled that as a matter of fundamental due process, a criminal conviction cannot be upheld on appeal on a basis not submitted to the jury. E.g., Cole v. State of Arkansas, 333 U.S. 196 (1948); Dunn v. United States, 442 U.S. 100 (1979); Chiarella v. United States, 445 U.S. 222, 236-37 & n.1 (1980); Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Garner v. State of Louisiana, 368 U.S. 157, 164-64 (1961). Cola was constitutionally entitled, on appeal, "to have the validity of [his] convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. State of Arkansas, 333 U.S. 196, 202 (1948). The Massachusetts Appeals Court in reviewing his conviction was obliged to affirm it or reverse it only on the basis of the case submitted to the jury. The affirmance on a new theory violated Cola's rights.

Citing Wainright v. Sykes, 433 U.S. 73 (1977), petitioner's first argument is that no objections were taken at trial to the court's charge. This foolish argument consists entirely of knocking down a straw-man. The First Circuit did not invalidate the conviction because of unobjected to errors in the charge; it invalidated the conviction because the Massachusetts Appeals Court unconstitutionally affirmed on a factual theory neither alleged in the indictment nor presented to the jury at trial. The First Circuit made this perfectly clear in its opinion, stating that it considered the charge to the jury "not for the purpose of finding error in it, but rather, in the limited context of due process challenges under Dunn, to determine the nature of the case before the jury." (787 F.2d at 695; Pet. App. A at 65). Accordingly, petitioner's first argument misses the point completely.

B. The First Circuit Did Not Impose New Constitutional Requirements on a Prosecutor's Argument

The petitioner's second argument is also of the strawman variety. Quoting out of context from the First Circuit's decision, petitioner claims that the First Circuit imposed new constitutional requirements on the prosecutor's opening and closing argument. This is a gross mischaracterization of the decision below.

The First Circuit determined that the jury was not charged concerning the creative theory of guilt first concocted on appeal. This alone would have been a sufficient basis for issuing the writ of habeas corpus. But, in order to give petitioner the benefit of any doubt, the court then looked to see if the appellate theory had at least been presented to the jury in the prosecutor's opening or closing argument. (787 F.2d at 693-94; Pet. App. A at 57-60).

The court found, charitably, that there was perhaps an incidental "side-reference" during the opening to facts relating to the crime articulated on appeal, and that there was no reference at all to the appellate crime during the prosecutor's closing. The court held that the arguable side-reference to the appellate theory during the opening was not constitutionally sufficient to find that the crime Cola was convicted of on appeal -- a crime not mentioned in the summation or jury charge -- was the same crime Cola was convicted of by the jury. E.g., Chiarella v. United States, 445 U.S 222, 236-37 & n.1 (1980).

The court concluded that "the prosecutor's opening statement and the judge's charge to the jury, when compared to the appellate theory . . . , are simply not the same." 787 F.2d at 700; Appendix A p. 91 (emphasis deleted). The court further stated that "because we find the appellate

theory not to be meaningfully present in any of the principal stages of trial, we need not decide the issue of whether certain stages, specifically, the judge's charge and the prosecutor's summation, deserve more scrutiny or weight than others." 787 F.2d at 693 n.11; Pet. App. A at 57 n.11.

The court did not purport to regulate the content of the opening or closing. It simply held, correctly, that they provided no factual support for the frivolous contention that the appellate theory of guilt was before the jury.

C. The First Circuit Merely Followed Longstanding Decisions of this Court Holding that it Violates Due Process to Be Convicted on Appeal of a Crime Neither Alleged in the Indictment Nor Presented to the Jury at Trial

Petitioner makes the absurd argument that the principles applied by the First Circuit are matters only for supervisory review of federal trials. Petitioner overlooks the fact that the First Circuit's decision is

compelled by a long line of due process cases commencing with Cole v. State of Arkansas, 333 U.S. 196 (1948), where under identical circumstances this Court invalidated a state court conviction on due process grounds.

In Cole, as here, the state appellate court upheld a conviction on a ground that was supported by the evidence, but which differed from the theory upon which the case was tried and presented to the jury. This Court held as follows:

> If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is doubtful that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of due process to send an accused to prison following conviction on a charge on which he was never tried as it would be to convict him upon a charge that was never made . . . . To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

Id. at 201 (emphasis added).

The holding in Cole that a conviction cannot constitutionally be upheld on theories that were never tried, is directly on point and dispositive of all of petitioner's arguments. Cole has been followed by this Court in numerous due process cases involving both state and federal convictions. E.g., Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Garner v. State of Louisiana, 368 U.S. 157, 163-64 (1961); Dunn v. United States, 492 U.S. 100 (1979).

Among these decisions, the First Circuit found Dunn v. United States, 442 U.S. 100 (1979) to be a particularly relevant precedent. Petitioner, noting that Dunn was a federal prosecution, asserts here, as it did below, that Dunn was not a due process case, but was decided under this Court's supervisory powers over the lower federal courts. (Petition at 21). This is a truly

frivolous contention as shown not only by Cole, supra, but by the language of Dunn itself:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends due process. . . . [A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial. As we recognized in Cole v. State of Arkansas, supra, 333 U.S. at 201, 68 S.Ct. at 517, '[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.'

442 U.S. at 106 (emphasis added).

No court has ever interpreted Dunn as being rooted in the supervisory powers rather than in the due process clause. Such a construction would be completely at odds with the holding and reasoning of both Dunn and the long line of due process cases that preceded it.

In sum, the First Circuit's decision was nothing more than an application of well-settled principles to a factually complex prosecution. The case did not create new law and it clearly is not in conflict with the decision of any other circuit or of a state court of last resort. Petitioner has failed even to argue any errors as to one of the two bases for the court's decision. The petition for a writ of certiorari is utterly frivolous and should be denied with an order awarding damages to Cola pursuant to S.Ct. Rule 49.

CONCLUSION

The respondent, Neil R. Cola, respectfully requests that the petition for a writ of certiori be denied and that the court award damages to respondent in accordance with the provisions of S.Ct. Rule 49.

By his attorneys,

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